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English law

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V. 2

OF CASES

ED IN THE

OF CHANCERY,

ORE

AGE WOOD, KNT.

NCELLOR.

AUGHAN JOHNSON,

HEMMING,

S, BARRISTERS-AT-LAW.

I.

26 VICTORIÆ.

LLER AND PUBLISHER,

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ON STREET, DUBLIN.

REPORTS OF CASES
ADJUDGED IN THE
HIGH COURT OF CHANCERY,

BEFORE

SIR WILLIAM PAGE WOOD, KNT.
VICE-CHANCELLOR.

By HENRY ROBERT VAUGHAN JOHNSON,
AND
GEORGE W. HEMMING,
OF LINCOLN'S-INN, ESQUIRES, BARRISTERS-AT-LAW.

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ERRATA.

Page 271, note (f) for Ch. read Exch.

357, note (d) for Johns, read Jo. & H.

REPORTS OF CASES

ADJUDGED IN THE

High Court of Chancery,

BEFORE

SIR WILLIAM PAGE WOOD, KNT., VICE-CHANCELLOR:

COMMENCING IN THE

TWENTY-FOURTH AND TWENTY-FIFTH YEAR

OF THE REIGN OF HER MAJESTY,

1861.

46h 381

13 Eq 93
6 2R. H. 381

BARRY v. CROSKEY.

1861.

July 17th.

THIS cause now came on to be argued upon several demurrers. *Fraud—False Representations—Injury to third Parties—* 4 QBD 687

Damages—Consequences too remote—Stock Exchange—Settling Day—Time Bargains—Public Company—Fraud of Directors, Fraud of Company—Jurisdiction—Money Bills—Multiplicity of Actions.

The principles by which, in the administration of justice, the limits of responsibility for the consequences of a false representation are to be ascertained, are these :—

First :—Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and, so acting, is injured or damnified.

Second :—Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified ; provided it appear that such false representation was made with the direct intent, that it should be acted on by such third person in the manner that occasions the injury or loss.

Third :—But, to bring it within the second principle, the injury must be the immediate, and not the remote, consequence of the representation thus made.

A bill averred, that Defendants, the directors and secretary of a projected railway company, having, partly by allotments to fictitious persons and partly by purchase, obtained possession of all the shares of a given class in the company, through their broker induced Plaintiff, a stock jobber, to contract to sell them certain of such shares, to be delivered upon the "settling day" to be appointed by the committee of the Stock Exchange ; and that they then, by false and fraudulent representations made by them in their official character to the committee of the Stock Exchange, procured the appointment of a settling day ; upon the arrival of which, Plaintiff, being by reason of the scheme thus contrived by Defendants unable to

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The bill was filed by one *Horace Barry*, describing himself as a stock jobber, against the *Buenos Ayres and San Fernando Railway Company, Limited*, *Joseph Rodney Croskey*, the concessionaire of the undertaking which that company was constituted to carry out, the Defendants *Magnus, Campbell, Bold, Heatley, Hopkins, Jackson, Lewis, and Maughan*, all directors of the company, *Alfred Elborough*, the secretary of the company, and *Manuel Castello*, also described as a stock jobber, to obtain relief in respect of certain contracts entered into between the Plaintiff and *Castello*, acting, as alleged, on behalf of the Defendants *Croskey* and *Magnus*, for the delivery by the Plaintiff of certain shares in the company, upon the ground that such contracts were fraudulent and void, or at any rate inoperative, against the Plaintiff.

procure the shares he had contracted to deliver, except at a ruinous premium, was compelled to pay Defendants a sum specified in the bill to release him from his contract: and the bill prayed for a declaration, that such contract was fraudulent, and void, or inoperative, and for repayment to Plaintiff of the amount he had paid in respect thereof. The company having been joined as Defendants to the bill, upon the ground that they had adopted the fraudulent representations made by their directors and secretary to the committee of the Stock Exchange:—*Held*, on demurrer by the company, that, although the company might have benefited by the fraudulent representations, e. g. by obtaining a quotation and an increased price for their shares—and although, *semble*, they might be answerable for that increased price, or for any other direct advantage derived from such fraudulent representations—yet, it not being shown that the company knew such representations were made by their directors with intent to defraud the Plaintiff, by compelling him to perform his contract, or even that they knew of the existence of such a contract, the company were not responsible for the loss Plaintiff had thus incidentally sustained: and the company's demurrer was allowed.

But *held*, that the bill was not open to demurrer on the part of the other Defendants, as being a mere bill for the recovery of money.

Distinction, in this respect, between a bill of this description against a single Defendant, and a bill, like the present, averring a combination of several Defendants, against some of whom Plaintiff may have a direct remedy at law, while against others he may have no remedy at law, or no remedy except by as many separate actions of deceit as there are parties Defendants to the suit.

Langridge v. Levy (2 Moo. & W. 519) explained.

Discovery—Common Law Procedure Acts.

The circumstance, that, by the present practice of Courts of common law, the Plaintiff might have obtained discovery at law as to the truth or falsehood of the averments in the bill, *held* not to oust the jurisdiction which previously existed in the Court of Chancery to compel such discovery.

Time Bargains—"Gaming or Wagering" Contracts—8 & 9 Vict. c. 109, s. 18.

Observations on the law as to time bargains. The question in such cases is, whether at the time of making the contract there was a *bonâ fide* intention to purchase or to deliver shares. If there was such an intention, the contract is good: if there was not such an intention, the contract is an "agreement by way of gaming or wagering" within the 18th section of the 8. & 9 Vict. c. 109, and by that section is null and void.

The bill averred, that, whilst they were engaged in promoting the company, the Defendants *Croskey* and *Magnus* contrived a scheme for defrauding the Plaintiff and others of very large sums of money, by means of fraudulent dealings in the shares of the company, as thereinafter more particularly mentioned.

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Then, after setting out the rules and customs of the *London Stock Exchange* with respect to dealings in public companies recognized by that association (a), the bill contained the following averment:—"Having regard to the said rules and customs of the *Stock Exchange*, the scheme

(a) Upon this subject, the averments in the bill were as follows:—"According to the rules and customs of the association called the '*London Stock Exchange*,' with respect to dealings in shares in public companies, which have been recognized by that association, and whose shares are consequently permitted to be quoted in the official list of the *Stock Exchange*, when a broker is employed to buy or sell any such shares he applies to a stock jobber or dealer in shares, who, without knowing whether the object of the broker is to buy or sell shares, names a price at which he is willing to buy shares in the particular company, and a somewhat higher price, at which he is willing to sell shares in the same company. Before a settling day is fixed as hereinafter explained, no dealings for cash can take place; nor can any dealings be enforced, by the rules of the *Stock Exchange*, until after such settling day is fixed. In every case

of such dealings in shares, after the first settling day has passed, the broker or his employer may either require the bargain to be made immediately for money or may, at his option, require it to be completed on the next account or settling day. Two settling days are appointed in each month for the completion of transactions relating to the buying or selling of shares in public companies recognized by the *Stock Exchange*, and for which days all bargains for time are made. Assuming the dealer to be the seller, if he requires the transactions to be completed for money, and the seller does not happen to have a sufficient number of the required shares in his possession, it becomes his duty at once to procure the same in the market for shares. If the sale is for the account or settling day, it becomes his duty to deliver the required number of shares on that day. In either case, if the seller fails to fulfil his engagement, he is declared a

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which was contrived by the Defendants *Croskey* and *Magnus* was, that they should procure as large a number as possible of the shares in the capital of the company to be allotted to themselves, and their nominees, and to fictitious persons, whose shares they would be able to place under their own control by pretended transfers or otherwise; and that they should, at the same time, through as many different brokers and others as they might think desirable, enter into extensive contracts for the purchase of shares in the market for shares; and, having by means of some of those contracts obtained all the disposable shares which they might be unable to procure to be allotted to themselves directly or indirectly, and having thus partly by allotment and partly by purchase obtained all, or nearly all, the existing shares in the company, and rendered it impossible for the remaining sellers of shares to procure shares to be delivered in pursuance of their contract, they hoped, by collusion with the directors and officers of the company, to procure the same to be recognized by the Stock Exchange, and thereby to acquire the means of

defaulter, and thereupon ceases to be a member of the Stock Exchange; and the purchaser is at liberty to buy the number of shares contracted for in the market, and to charge the seller with the excess, if any, of the price actually paid over the contract price. This and other like rules have been found by long-continued usage and experience to be conducive to the efficient conduct of mercantile transactions in the shares of bona fide public companies; they exist only in the case of companies which have been recognized by the committee of the Stock Exchange appointed

for that purpose; and, before any company is so recognized, the committee require such company, and the directors and officers thereof, in their official character, to furnish full details and explanations as to the bona fides of the undertaking, the allotment and issue of shares, and the payment of deposits, and generally as to the constitution and position of the company; and no company is recognized by the Stock Exchange until the said committee has been satisfied that the requirements of the Stock Exchange in respect of the matters aforesaid have been complied with."

extorting such sums of money from the remaining sellers of shares, as the price of their cancelling the contracts, as they might be able to do, without disclosing the frauds of which they had been guilty. The last-named Defendants, whilst engaged in promoting the said company, communicated the said scheme to divers persons, and offered to appoint them, or procure them to be appointed, directors or officers of the company, on condition of their concurring and assisting in the prosecution thereof. They made such communication and offer to the Defendants hereinbefore named as the directors of the said company, who accepted the same offer, and undertook to assist, and did assist, in the prosecution of the said scheme in manner herein mentioned and otherwise."

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The bill then averred, that the scheme so contrived by the Defendants *Croskey* and *Magnus* was carried into effect by them with the concurrence of the other directors and the secretary of the company, stating in detail the several steps by which this, as the Plaintiff alleged, was effected.

In particular the bill averred, that, in pursuance and as part of the scheme, *Magnus* procured himself to be appointed one of a committee of three directors of the company, to whom the allotment of shares was intrusted by the Board of Directors; that he then, with *Croskey*, procured numerous applications for allotments of shares to be made, in some instances in the names of persons who were willing to act as their nominees, and in other instances in fictitious names; and, in particular, that he procured an application for and allotment of 2070 shares to fifteen persons named in a list set forth in the bill, most of whom were fictitious, the rest being nominees of *Croskey* and *Magnus*. The Plaintiff charged, that, neither in the case of the application for shares by *Croskey*

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and *Magnus* personally nor in the case of any of the other applications for shares which were made at their instance, was the sum of £1 for each share applied for paid to the bankers of the company, as required by the prospectus of the company; and the said applications for shares were entertained by the committee of allotment in direct violation of the terms of the prospectus. And the Plaintiff charged, that the company, and its directors and secretary, had notice that the applications were not made *bonâ fide*, but, acting in collusion with *Croskey* and *Magnus*, they took no steps for cancelling the abortive allotments.

The Plaintiff then averred by his bill, that, before the allotment of shares had been made, the Defendants *Croskey* and *Magnus* communicated their scheme to the Defendant *Castello*, and requested him to concur in the said scheme, and to assist them in the prosecution thereof, which he agreed to do and did, on the terms that he should share with them in the profits which might result from the success thereof; and, in furtherance of the said scheme, they arranged with him that he should, nominally on his own behalf but in truth on their account also, enter into contracts with other stock brokers and stock jobbers for the purchase of as many shares in the company as he might be able to purchase without greatly increasing the price of the shares, on the terms that he should share with them in the profits which might result from the success of their scheme; that, in pursuance of the said scheme, *Castello*, acting in collusion with *Croskey* and *Magnus*, bought from the Plaintiff and others, on account of those Defendants, 8035 shares; that, during the same period, other stock brokers, acting on the instructions of the Defendants *Croskey* and *Magnus*, entered into contracts for the purchase of large numbers of shares on their behalf; and that, by the means aforesaid, the last-named Defendants had, at

the time when the allotment of shares in the company was made, entered into contracts for the purchase of many more than the total number of shares of which the capital of the company consisted. The bill averred, that all the aforesaid contracts were according to the terms and effect thereof, and, having regard to the rules and customs of the Stock Exchange, dependent on the company being recognized and a settling day fixed by the Stock Exchange; and, according to the terms thereof, the shares contracted to be sold were deliverable on the first settling day to be appointed by the committee of the Stock Exchange.

Then, after setting out the conditions which, as the bill averred, a company is required to comply with before it can be recognized by the Stock Exchange (a), and stating that those conditions had not been and never could

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(a) These conditions, as averred in the bill, were as follows:—

“The committee will fix a settling day for the shares of a new railway or other industrial company, and order its quotation in the official list, on being satisfied of the bona fides of the concern and on the fulfilment of the following conditions; but no application for such settling day shall be entertained until notice thereof shall have been affixed in the Stock Exchange for at least two clear days prior thereto:—that the application (which must be previously laid before the secretary of the railways department of the Stock Exchange and certified by him) be accompanied by the bankers' pass-book and a certificate from the secretary of the company, stating, that not less

than two-thirds of the shares have been subscribed for and the deposit paid thereon (such payment to be certified by the bankers of the company), that the scrip or shares are ready for delivery, and that no impediments exist to the settlement of the account. The committee will, notwithstanding (if they deem it expedient), fix a settling day for any new company in cases where the foregoing conditions have not been complied with, provided the scrip or shares be ready for delivery, and that no impediment exists to the settlement of the account; it being expressly understood, that, when a settling day is fixed under these circumstances, the shares of such company shall not be quoted in the official list. The secretary, in announcing to the Stock Ex-

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be complied with by the Defendants the company, the bill contained the following averment:—"In consequence, however, of the form of the said contracts, it became indispensable to the success of the scheme contrived by the Defendants *Croskey* and *Magnus* that the company should be recognized by the Stock Exchange, and a settling day appointed; and, although the directors and officers of the company well knew that the requirements of the Stock Exchange had not been complied with, they did, in their official character, but acting at the instance of and in collusion with *Croskey* and *Magnus*, and for the purpose of enabling them to carry into effect their said fraudulent scheme, make such untrue and fraudulent representations to the committee of the Stock Exchange as induced them to come to the conclusion (contrary to the fact), that the requirements of the Stock Exchange had been complied with, and to appoint a settling day and allow the shares of the company to be quoted on the Stock Exchange. For example, the directors and officers of the company acting in the character aforesaid, and, in particular, the Defendant *Alfred Elborough*, as the secretary of the company, represented to the committee of the Stock Exchange, that a bonâ fide allotment of 10,200 ordinary shares had been made; and that the whole of the said 10,200 shares had been subscribed for; and that the full deposit of 2*l.* 10*s.* had been paid in respect of each of the said shares; and that all the remaining shares in the company had been reserved for the contractors and the concessionaire: whereas the said directors and officers, at the time when they made such representations, well knew that they were untrue, and, in particular, well knew that the pretended allotment of 2,070 shares to the persons mentioned in the said list (and

change a settling day for shares of a new company, shall state in his notice whether it be fixed with or without the authority for its insertion in the official list."

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which shares were included in the 10,200 shares represented to have been allotted) was illusory and abortive; and that no deposit whatever had been made in respect of such shares; and that, in truth, less than one-half of the shares in the company had been subscribed for, and that the deposit had been paid on a still smaller number: and the Plaintiff charges, that, in order to deceive the committee of the Stock Exchange, by making the bankers' pass-book of the company correspond with the said representations as to deposits on shares, the Defendants had, a short time previously, raised on loan and paid to the account of the company with their bankers, a large sum of money, which the directors and officers of the company, in the character aforesaid, represented to the said committee to have been received in respect of deposits on shares. The committee of the Stock Exchange had no means at the time of detecting the inaccuracies of the representations made on behalf of the company as aforesaid; and they were induced, by such untrue and fraudulent representations as aforesaid, to believe that the company had in fact complied with the requirements of the Stock Exchange, and to consent, and they accordingly did consent and agree that the company should be recognized by, and that the shares of the company should be permitted to be quoted on, the Stock Exchange; and they appointed the 27th day of March, 1860, to be the first account or settling day for the shares of the company."

The bill further averred, that all the Defendants therein-before named as the directors of the company were parties to and acquiesced in the said allotment of shares, and knew the circumstances under which such allotment was made, and were acquainted with the fictitious and fraudulent character of the applications for shares made by or on behalf of *Croskey* and *Magnus*, and with the nonpayment of the deposit on the shares so allotted as aforesaid, and were

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acquainted with the truth in respect of all the matters as to which representations were made as aforesaid to the committee of the Stock Exchange, and knew that such representations were untrue. Nevertheless, the said Defendants and the company acquiesced in and adopted such representations; and thereby the public, and the Plaintiff as one of the public, were led to believe and did believe that the company had been duly constituted in accordance with the requirements of the Stock Exchange, and had become entitled, according to the rules thereof, to be quoted on the official list of the Stock Exchange.

The bill then stated, that, on the 6th of May, 1860, in the ordinary course of his business, the Plaintiff agreed to sell to *Castello*, and *Castello* agreed to purchase—ostensibly on his own behalf, but in truth on behalf of the Defendants *Croskey* and *Magnus*, and in pursuance of the said arrangement with them—100 shares in the capital of the company, to be delivered on the settling day to be appointed by the Stock Exchange, at the price of 306*l.* 5*s.*, being at the rate of 9-16ths premium on shares on which a deposit of 2*l.* 10*s.* had been paid; that, at the date of the said contract, *Croskey* and *Magnus* had, by allotments and contracts for purchase, acquired the whole of the shares in the company on which 2*l.* 10*s.* only had been or was to be in the first instance paid; and *Castello* well knew that they had so done; and *Castello*, acting in collusion with *Croskey* and *Magnus*, entered into the said contract, not for any bona fide purpose, but in order to enable them fraudulently to obtain large sums of money from the Plaintiff, under colour and by means of the said rules and customs of the Stock Exchange; that, a settling day having, in consequence of the fraudulent misrepresentations of the Defendants, been actually appointed by the committee of the Stock Exchange, the Plaintiff, believing at the time that the said contract had become binding on him, and not having been able on the

27th day of March (being the settling day so appointed) to obtain shares for delivery in pursuance of his said contract, applied to *Castello* on the subject. Whereupon *Castello*, in pursuance of the scheme contrived by the Defendants *Croskey* and *Magnus*, proposed to the Plaintiff on their behalf that the said contract should be continued to the next settling day (that is to say) that the same should be cancelled on payment by the Plaintiff of a moderate sum, and on the condition that the Plaintiff should enter into a new contract for the delivery of 100 shares in the capital of the company on the 12th day of April, 1860, being the next settling day; that the Plaintiff accepted this proposal, and accordingly paid to *Castello* the sum of £100, as part consideration for the cancellation of the contract, and, as a further consideration therefor, entered into a new contract with *Castello*, acting in the same character as thereinbefore mentioned, for the delivery of 100 shares in the capital of the company on the 12th day of April, 1860, at the price of £400, being after the rate of 1½ premium.

The bill further stated, that, on the 12th day of April, 1860, the Plaintiff was still unable to deliver shares to the Defendants in pursuance of the new contract, and was in the same way induced to pay a further sum of money to *Castello* on behalf of the Defendants *Croskey* and *Magnus*, and to enter into a substituted contract for the delivery of 100 shares in the capital of the company, at a still higher price, on the next settling day; that similar transactions took place between the Plaintiff and *Castello*, acting on behalf of *Croskey* and *Magnus*, on each subsequent settling day, until the 13th day of June, 1860, at which time the price of the shares had by the fraudulent transactions of the Defendants thereinbefore referred to, been raised to a nominal premium of £6 to £7; there not being in fact then, and not having been for long previously, any actual dealings in such shares; and, on that day, the Plaintiff—not

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knowing and not having the means of ascertaining that the high price to which the shares had risen was the result of fraud, or, if it was in fact the result of fraud, not knowing or having the means of ascertaining that *Castello*, or those for whom he was acting, were parties to the fraud, and being apprehensive of the consequences of his allowing the transaction to remain open any longer—applied to *Castello*, and requested him to agree to some terms for finally releasing the Plaintiff from the then existing contract between them; that *Castello* for some time absolutely refused so to do, but at length, on the urgent request of the Plaintiff, he consented to release the Plaintiff from his said contract, on payment by him, in addition to the sums he had already paid, of the sum of 256*l.* 5*s.*; that, as the result of the said transactions between the Plaintiff and *Castello*, acting on behalf of *Croskey* and *Magnus*, they obtained from the Plaintiff the sum of £625 in the whole; and that, as the result of similar transactions entered into with other stock jobbers and dealers in shares, *Croskey* and *Magnus*, in and before the month of June, 1860, obtained from such stock jobbers and dealers in shares upwards of £10,000 in the whole.

Lastly, the bill stated, that, suspicions having been aroused, the committee of the Stock Exchange, on the 30th of June, 1860, undertook to investigate the documents upon which the company had obtained a quotation for their shares; and that, having done so, the committee, on the 20th of June, resolved that the name of the *Buenos Ayres* and *San Fernando* Railway Company should be struck out of the official list of the Stock Exchange.

The Plaintiff charged, by his bill, that all the Defendants, having been in manner aforesaid implicated in the said frauds, were liable to the Plaintiff for the repayment of the

said amount, with interest; and, in particular, the Plaintiff charged, that the company, having, by the fraudulent acts of the directors and officers thereof, done and committed in their official character, and adopted and sanctioned by the company as aforesaid, enabled the other Defendants to carry their said scheme into effect as against the Plaintiff, were liable to make good to the Plaintiff the losses he had sustained as aforesaid, with interest.

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The prayer of the bill was, that it might be declared that the several contracts, entered into between the Plaintiff and the Defendant *Castello*, acting on behalf of the Defendants *Croskey* and *Magnus*, were fraudulent and void, as against the Plaintiff, or, at all events, that the same respectively were not, and never could be, binding or operative upon or against the Plaintiff; and that an account might be taken of all the moneys paid by the Plaintiff to the Defendant *Castello* in respect of the said contracts, with interest; and that the Defendants might be ordered to pay to the Plaintiff what should be found due to him on taking such account.

To this bill separate demurrers for want of equity were put in—one by the company, another by *Croskey*, a third by *Magnus*, and a fourth by *Elborough*.

Sir *Hugh Cairns* and Mr. *Morris*, on behalf of the company, contended that their demurrer must be allowed.

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[They were proceeding to argue, that, even assuming the company to have derived benefit from the fraudulent representations in the bill alleged to have been made by the other Defendants, or some of them, to the committee of the Stock Exchange, and assuming, that the company could be held to have constituted the directors their agents

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for the purpose of making such representations, and to have adopted such representations as their own (both of which positions they were prepared to dispute), still there was nothing in the bill to fix the company with collusion in, or even with knowledge of, the scheme contrived, as the bill alleged, by the other Defendants for the purpose of defrauding the Plaintiff in the manner of which he complained ; when they were stopped by the Court.]

The VICE-CHANCELLOR.—I have read through the bill, and, having done so, I feel so strong an impression that it contains nothing to fix the company (however it may affect the directors of the company) with responsibility for the loss of which the Plaintiff complains, that, without further argument in support of their demurrer, and without expressing any opinion upon the case as it affects the other Defendants, I must call upon the Plaintiff's counsel to show that the company are properly made parties to the suit.

Mr. Rolt, Q.C., Mr. Daniel, Q.C., and Mr. C. T. Simpson, in support of the bill, contended, that the company were properly made Defendants to the suit:—

The company are responsible equally with the other Defendants for the loss sustained by the Plaintiff by reason of the false and fraudulent representations in the bill alleged to have been made to the committee of the Stock Exchange. Those representations were made by the other Defendants in their official character, as the directors and secretary of the company. In that character it was their duty, and exclusively their duty, to satisfy the committee of the Stock Exchange, that the conditions which a company is required to comply with before it can be recognized by the Stock Exchange had been complied with—the company being incapable of acting, except through its

directors and officers. This duty the Defendants have violated, by making false and fraudulent representations to the committee of the Stock Exchange, inducing them to believe, that the conditions in question had been complied with, when, in fact, they had not. The company have derived direct and extensive profits and advantages from those false and fraudulent representations, inasmuch as they have obtained thereby the appointment of a settling day, have procured their shares to be quoted in the official list of the Stock Exchange, and have greatly increased the value of their shares, raising them to a premium of from £6 to £7. They have been content to derive these direct and extensive benefits from the false and fraudulent representations of their directors, and, having so done, must be held to have adopted the directors as their agents for making those false and fraudulent representations, and to have adopted those false and fraudulent representations as their own. That being so, the company must be held responsible for the loss sustained by the Plaintiff, and others in his position, as, in *The National Exchange Company of Glasgow v. Drew* (a). Statements made by the directors of a company are statements made by the company: *Ayre's case* (b), *Ranger v. The Great Western Railway Company* (c), *Conybeare v. The New Brunswick, &c. Company* (d). So here, acts done by the directors and secretary of the company were acts of the company. In *The National Exchange Company of Glasgow v. Drew*, the company was only indirectly benefited by the false representations contained in the reports of their directors. There the company was only benefited in so far as the market value of their shares might have been kept up in consequence of those representations. Yet they were held responsible. [They read p. 132 of the report.] In the present case the

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(a) 2 Macq. 103.

(b) 25 Beav. 513.

(c) 5 H. L. Cas. 86.

(d) 1 De G., Fisher, & Jones, 578.

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company has derived the most immediate and substantial benefits from the frauds practised by its directors. The very existence of the company was dependent upon the perpetration of that fraud on the part of its directors. Their acts alone could obtain the appointment of a settling day, and give existence in the Stock Exchange to the company. And those acts, the company must, upon this demurrer, be taken to have adopted: *Whitfield v. The South-Eastern Railway Company*(a).

The VICE-CHANCELLOR.—There is no doubt, that a company, by its directors and servants, may make false representations, and may adopt those false representations as their own; nor is there any doubt, that a company may make itself responsible for loss occasioned to third persons by such false representations, where, as in the case of *The National Exchange Company of Glasgow v. Drew*, the representations have been made with intent that they should be acted upon by the party injured in the manner that has occasioned the injury, and where the company has derived profit from the transaction. But, admitting this to be so, and assuming, for the sake of argument, that this company, by its directors, has made false representations, how does it appear, that the company derived profit from the Plaintiff being compelled, or believing himself compelled, to perform the contracts he had entered into for the delivery of shares? How does it appear, that the company had any knowledge, or any means of knowledge, of the existence of those contracts?

Mr. Rolt.—Collaterally and incidentally the company derived the greatest possible benefit, by obtaining, as we have shown, a quotation, a market, and higher prices for their shares. But benefit to the company is not the only test of responsibility. To make the company responsible

(a) Ell., Bl., & Ell. 115.

it is not necessary that any benefit should enure to them. "It is a very old head of equity, that, if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false:" per Lord *Eldon* in *Evans v. Bicknell*(a). The true test is not "has the company derived a profit?" but "has the Plaintiff sustained injury?" The question is not, whether any money has found its way into the coffers of the company, but whether any has been taken from the pocket of the Plaintiff, in consequence of the false representations for which the company has made itself responsible. In cases like the present, there are but three tests of responsibility:—First, has there been a false representation? Secondly, was that false representation made with intent to deceive? Thirdly, has damage been sustained? Here all these concur. If there has been a false representation, it is immaterial to whom it was made. It is immaterial whether it was made to the person who eventually sustains the injury, or to a third person who communicated it to the party who acted upon the faith of it, and, so acting, sustained the injury. This is clear from the *Gun* case, *Langridge v. Levy*(b). There, the false representation, viz. that the gun was a gun of *Nock's*, was made to the father, who purchased the gun; the party injured was the son; yet the son brought the action and recovered damages.

The VICE-CHANCELLOR.—I take the ground of that decision to have been, that the false representation was made by the Defendant with a view that it should be acted upon by the son in the manner that occasioned the injury. Lord *Wensleydale* says, "There is a false representation made by the Defendant, with a view that the Plaintiff should use the instrument in a dangerous way"(c). The

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(a) 6 Ves. 182, 183.

(b) 2 Mee. & W. 519.

(c) Ibid.

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father, acting upon the faith of that representation, put the gun into the hands of his son, who fired it off, when it burst and injured him. Suppose a stranger, knowing nothing of what had passed between the father and the Defendant, to have found the gun, lying for instance at an inn. If a stranger so finding the gun had taken it up and fired it, and the gun had burst and injured him, would he have had his action against the Defendant, upon the ground that *Nock's* name appeared upon the gun, and the Defendant had sold it with that name appearing upon it and as a gun made by *Nock*?

Mr. Rolt.—The gun was sold in order to be used in the manner which occasioned the injury; and, that being so, Lord *Wensleydale* expressly says, it was immaterial whether the Defendant intended the false representation itself to be communicated to the person who sustained the injury (a). In the present case, the representation, that the conditions required by the Stock Exchange had been complied with, must be taken to have been made by the company with the intent that a settling day should be appointed, and, as a necessary consequence, that the public, and every member of the public, who had entered into contracts for the delivery of shares upon the settling day when appointed, should be held upon that day to make good their engagements—consequently, that the Plaintiff should be so held to make good the contracts in respect of which he now seeks relief. Therefore, admitting that there is nothing in the bill to show that the company had any knowledge, or any means of knowledge, of the particular contracts which the Plaintiff had entered into for the delivery of shares, that circumstance will not relieve the company from responsibility.

The VICE-CHANCELLOR.—Your argument would show,

(a) 2 Mee. & W. 519.

that every person who, in consequence of *De Berenger's* frauds upon the Stock Exchange, was induced to purchase stock at an advanced price, in reliance upon the false rumour he had circulated, that peace was concluded, was entitled to maintain an action against *De Berenger* for the increase of price. Would not such consequences be too remote to form ground for an action ?

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Mr. *Daniel*.—We submit, that, according to modern decisions, they would not ; at all events, that, in the present case, the Court will not decide the question, whether the damage is not too remote, upon demurrer. In *Bedford v. Bagshaw*(a), the Defendant, a director of a company, by false and fraudulent representations made by him to the committee of the Stock Exchange, procured a settling day to be appointed for the company, and the shares of the company to be quoted ; the Plaintiff, as one of the public, was misled, by seeing the company's shares in the official list of the Stock Exchange, into purchasing certain shares ; and, upon those shares proving worthless, the company was held responsible for the loss the Plaintiff sustained by purchasing them. In his judgment in that case, Mr. Baron *Bramwell* says, " It is not a bad rule, that a person who makes a fraudulent representation, which is intended to be generally circulated, shall be liable to any person injured by acting upon it, however remote the consequences may be "(b).

The VICE-CHANCELLOR.—That may be sound doctrine in measuring the limits of moral responsibility.

Mr. *Daniel*.—It is not the less applicable in the administration of justice, because sound in morals. Even if a hundred persons intervened between the original fraudulent representation and the party injured, the person

(a) 4 Hurlst. & Nor. 538.

(b) Ibid. p. 548.

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making that representation should, and safely might, be held responsible.

We have a right to argue this case as if all the Defendants other than the company were insolvent, and as if the company only were responsible. Having insolvent persons individually liable for acts done by them in their official character for the benefit of the company—acts which the company have adopted, and, by adopting them, have derived large and direct profit—we submit we have a right to hold the company responsible.

[They cited also *Pasley v. Freeman*(a), *Slim v. Croucher*(b), and *Scott v. Dixon*(c); and distinguished *The Royal British Bank v. Nicol*(d).]

The VICE-CHANCELLOR.—Though I am convinced this bill will not lie against the company, I will hear the arguments on behalf of the other Defendants, before disposing of it upon the company's demurrer.

Mr. *Giffard*, Q.C., and Mr. *Swanston*, jun., for the Defendant *Croskey*, Mr. *Baggallay*, Q.C., and Mr. *Tripp*, for the Defendant *Magnus*, and Mr. *Fooks*, for the Defendant *Elborough*, contended, that their demurrers must severally be allowed.

First. The bill carefully abstains from mentioning the date of the agreement by which the Plaintiff was released from his contracts on payment, in addition, as it is stated, to the sums he had already paid, of the sum of 256*l.* 5*s.* Now, if the agreement was made after the Plaintiff had discovered the alleged fraud, it would of course amount to

(a) 3 T. R. 51; *S. C.* 2 Smith's Leading Cases, 62, and cases there collected.

(b) 1 De Gex, Fisher, & Jones, 518.

(c) 29 Law J., N. S., Exch. 62, note.

(d) 5 Jur., N. S., 207.

a condonation, and would preclude him from seeking redress by the present bill. But, independently of that objection, and assuming it could be cured if leave were given to amend the bill, we contend—

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Secondly. That all the alleged contracts were “agreements by way of gaming or wagering” within the 18th section of the Act 8 & 9 Vict. c. 109, and by that Act were null and void; consequently, that a bill will not lie: *Grizewood v. Blane*(a).

Thirdly. The Plaintiff has mistaken the jurisdiction. His proper remedy, if he is entitled to any, is at law. This is simply a money bill. It expressly avers, that, “as the result of all the said transactions between the Plaintiff and *Castello*, acting on behalf of *Croskey* and *Magnus*, they obtained from the Plaintiff the sum of £625 in the whole.” That £625, therefore, is the measure of the Plaintiff’s loss, if any, and is the total sum for which he brings his bill. If such a bill is not demurrable, every case of alleged false warranty for a horse or misrepresentation of goods will be brought into this court.

[They cited *Story*, Eq. Jur.(b), and *Burnes v. Pennell*(c), and contended, that, upon the second and third grounds, all the demurrers should be allowed without leave to amend.]

The VICE-CHANCELLOR (to Mr. *Rolt*).—Upon the first ground alleged by the Defendants other than the company, it seems to me, until I have heard counsel in support of the bill, that their demurrers must be allowed, but with leave for the Plaintiff to amend, by stating the date of the agreement in question. The other grounds which have been urged in support of those demurrers appear to me untenable.

(a) 11 C. B. 526, 538. (b) Sec. 184. (c) 2 H. L. Cas. 497.

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[Mr. Rolt having consented to accept leave to amend, judgment was now delivered upon all the demurrers without further argument.]

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VICE-CHANCELLOR SIR W. PAGE WOOD:—

With regard to so much of the bill as seeks to make the company responsible for the loss sustained by the Plaintiff by reason of the false representations alleged in the bill, the argument addressed to me by the Plaintiff's counsel would push the doctrine of responsibility to an extent unwarranted by authority, and inconsistent, as it seems to me, with any sound principle upon which justice can be administered.

If it be asked, to what extent a man ought morally to be responsible for the consequences of a false representation made by him, the answer of course is, that morally he ought to be—as doubtless he is—responsible for all, even its remotest, consequences to the end of time.

But, in administering justice, the remote consequences, for which morally a man is responsible, cannot be taken as the measure of his responsibility.

The principles by which, in the administration of justice, the limits of responsibility should be ascertained, are well laid down in the authorities that were cited. I agree with every word of those authorities, except, perhaps, one rather strong dictum cited by Mr. *Daniel* from the report of the case of *Bedford v. Bagshaw*(a). I assent to every word of the Chief Baron's judgment in that case.

Those principles I take to be as follows:—

First. Every man must be held responsible for the conse-

(a) 4 Hurlst. & Nor. 548.

quences of a false representation made by him to another, upon which that other acts, and, so acting, is injured or damnified.

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Secondly. Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified—provided it appear, that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss. In *Langridge v. Levy*(a), the false representation was made to the father; the party who sustained the injury was the son; yet the son brought the action and recovered damages. The Court treated the representation as made by the Defendant with the intent that it should be acted upon by the son in the manner that occasioned the injury(b). In warranting the gun “to have been made by *Nock*, and to be a good, safe, and secure gun,” the Defendant must have contemplated, as a natural consequence, that the father, confiding in that warranty, might place the gun in the hands of his son, or of any other third person; and, such third person using the gun, and sustaining injury by using it, the Defendant was liable for that injury as a consequence of his false warranty.

Thirdly. But, to bring it within the principle, the injury, I apprehend, must be the immediate, and not the remote, consequence of the representation thus made. To render a man responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified, it must appear that such false representation was made with the direct intent,

(a) 2 Mee. & W. 519.

(b) Lord *Wensleydale*, then Mr. Baron *Parke*, says:—“There is a false representation made by the Defendant, with a view that

the Plaintiff should use the instrument in a dangerous way:” *Langridge v. Levy*, 2 Mee. & W. 519.

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that it should be acted upon by such third person in the manner that occasions the injury or loss. Thus, to recur to the case which I put during the argument, if, in *Langridge v. Levy*, the injury had been sustained, not by the son or any other person in whose hands the father, confiding in the Defendant's warranty, had placed the gun, but by a stranger who had found the gun lying at an inn or in any other public place, I apprehend no action would have lain. The Plaintiff might have proved, that he had read upon the gun the name of a maker which assured him that it was a good and safe gun; that, in reliance upon that name appearing on the gun, he had fired it off upon the occasion when it burst—he might have proved, that the Defendant had put *Nock's* name upon the gun, and had sold it with *Nock's* name upon it, and as a gun made by *Nock*, knowing that representation to be false—still, unless it had been shown, that the false representation was made by the Defendant with a view that it should be acted upon by the Plaintiff, no action would have lain. The consequence, that a stranger would take up the gun and fire it off upon the mere faith of that representation appearing on the gun, would have been a consequence too remote to furnish ground for an action for injury sustained by him by reason of the false representation.

To apply these principles to the case before me—

The position of the company, upon the averments of this bill, is very different from that of the other demurring parties.

As regards the principal Defendants, *Croskey* and *Magnus*, the bill avers a scheme contrived by them for the purpose of defrauding all persons who might enter into contracts to deliver shares by a given day; it avers, that, with this view, the Defendants procured the allotment of a vast number of shares to fictitious persons, thereby dimi-

nishing the number of shares in the market to the extent of one-half; and that, having purchased—and, as I must assume it against the pleader, properly purchased—the other half, the Defendants contrived, by means of false representations made by them to the committee of the Stock Exchange, to induce the committee to believe, that the conditions required to be complied with by a new company before fixing “a settling day,” as it is termed, had been complied with on the part of the company, and to fix a settling day accordingly:—thereby compelling all persons who had entered into contracts for the delivery of shares in the company to make good their engagements on the day so fixed; when, by reason of the previous scheme contrived by the Defendants for getting all the shares of the company into their own hands, the persons who had entered into contracts to deliver shares would find it impossible to obtain them, except at a ruinous premium.

Now, assuming these averments—as, for the purposes of the demurrer, I must assume them—to be true, and assuming the conduct so averred to have been a fraud on the part of the Defendants *Croskey* and *Magnus*, it follows, I admit, as a necessary consequence, that every person to whom they communicated the object of their scheme, and who knowingly took part in it by joining in making the false representations to the committee of the Stock Exchange and procuring the appointment of a settling day for the express purpose of enriching himself at the expense of those who, like the Plaintiff, had entered into contracts to deliver shares in the company, is in the same position of responsibility for such conduct as the Defendants themselves.

But, admitting this to follow as a necessary consequence, how does it render the company responsible?

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A case which has gone as far as any in fixing companies with responsibility is that of *The National Exchange Company of Glasgow v. Drew*(a). There, the directors of the company had, from time to time, made false and fraudulent reports to the company as to the state of its affairs. The company had acquiesced in those reports, had confirmed them, and concurred in their circulation. Upon the faith of those reports the Respondent, *Drew*, had been induced to purchase shares at a much higher price than he would have given for them if not misled by the fraudulent statements they contained. And it was adjudged by the House of Lords, that the company, by the course they had taken with reference to the reports of their directors, had adopted the directors as their agents for the purpose of making the fraudulent statements contained in those reports, had adopted those fraudulent statements as their own, and, through the agency of their directors, had made themselves liable for the consequences that might follow from the circulation of the reports; and accordingly, the company were ordered to make good the damage done to the Respondent, who, as I have stated, had purchased the share of a third person at a higher price than he would otherwise have given for it, and who (it is not unimportant to observe) would, in the event of a contrary decision, have had no remedy against his vendor, and would, therefore, have been remediless.

But that case, when examined, is strictly within the principle I have already stated. The false representations which the company constructively were held to have made, were so made with the intent, that they should be acted upon by the party injured in the manner that occasioned the injury. The representations were made to every member of the community who was likely to purchase shares in the company, consequently to the Respondent as

(a) 2 Macqueen, 103.

one such member; and they were so made with the intent, that every such member, and the Respondent as one, should purchase shares at high prices for the benefit of the company. The company, to raise the value of all their shares, employed the directors, as their agents, to make false and fraudulent statements, by means of which they induced others to purchase their shares at high prices—those persons being the very persons to whom the reports were addressed and the fraudulent statements communicated.

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In the present case, the company stands entirely exonerated from any intention to defraud the Plaintiff and others who had entered into the contracts in question by means of the scheme contrived by the other Defendants. There is nothing to fix the company with even a knowledge of that scheme. It is not averred in the bill, and it would be ridiculous to suppose, that any report was ever made to the company by its directors as to the existence of such a scheme. There is no averment, that any communication was ever made to the company, by its directors or otherwise, respecting such a scheme; and the company cannot be held to have adopted the directors as their agents, in respect of a matter not communicated to them by the directors or by any other person.

If this were the case, not of a company and its directors but of an individual principal and his agent, the principal could never be held responsible in the manner for which the Plaintiff contends; and the liability of a company cannot be greater than that of an individual. The company, wholly ignorant of the object for which its directors were anxious to have a settling day fixed, might be chargeable with improper conduct, in procuring the appointment of a settling day before the conditions required by the committee of the Stock Exchange had been fully complied with; and, possibly (though I am not at present called

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upon to give an opinion upon that point), the company might be answerable for any increase in the price of their shares, or for any other direct advantage they may have derived from the representations made by the directors as their agents, that those conditions had been complied with, when they had not been so complied with. But the question before me is, whether the company can be held responsible, in consequence of their directors having done acts which were foreign to the purpose for which the company procured their settling day to be fixed. That purpose was, that they might be a company of sufficient repute to have their shares "quoted," as it is called, on the Stock Exchange, and there bought, sold, and dealt with: and not that time bargains, such as have been entered into by the Plaintiff in this case, should be made for their benefit—still less, that such bargains should be enforced by a given day to the injury of the parties who have entered into them.

Collaterally and incidentally, no doubt, the Plaintiff may have been injured by the representations upon which the settling day was fixed for this company: not, however, as in the case of *The National Exchange Company of Glasgow v. Drew*, from having been led thereby into purchasing shares by a representation that they were of higher value than they were in fact—still less by being induced to complete his engagements. It was indifferent to the company whether the Plaintiff completed his engagements or not. They had no interest, nor can any interest be imputed to them in the matter.

Then, the company having no interest in the matter—although, no doubt, collaterally and incidentally, damage has resulted to the Plaintiff from the deceit which has been practised—I know of no authority to justify me in holding, that all the consequences of the deceit so prac-

tised are to be cast upon the company, by every person who may have been collaterally, but incidentally, damaged.

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The demurrer of the company, therefore, will be allowed, without leave for the Plaintiff to amend.

As regards the other Defendants, the grounds of demurrer were, first, that the time is not averred at which the agreement was made by which the Plaintiff was released from his contracts on payment by him, in addition to the sums he had already paid, of the sum of 256*l.* 5*s.* Upon that ground, I think, that the demurrers of the Defendants other than the company should be allowed, but with leave for the Plaintiff to amend; because, if the agreement was made after the Plaintiff became aware of all the facts in respect of which he now seeks relief, it would of course purge the transaction; while, on the other hand, if it was made before the Plaintiff had discovered those facts, he ought to have leave to amend his bill by inserting an averment to that effect.

Another ground of demurrer was, that the contract in question was, within the meaning of the 8 & 9 Vict. c. 109, "an agreement by way of gaming or wagering," in respect of which a bill will not lie. But, in the case of *Grizewood v. Blane*(a), it was left to the jury to say, whether, at the time of making the contract, there was a bonâ fide intention to purchase or to deliver the shares; and, upon motion for a new trial, that was held to be the true test of the legality of the transaction. In the present case, I think, there is sufficient in the averments of the bill (whatever may be disclosed by the answers when put in) to show, that the Plaintiff, at the time of entering into this contract, had a bonâ fide intention to deliver the shares in ques-

(a) 11 C. B. 539.

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tion; and, taking those averments, as I must now take them, to be true, the bill is not open upon this ground to a demurrer.

The last ground—and it was the point most strongly argued by the counsel for the demurring parties other than the company—was, that, assuming the Plaintiff's case as made by the bill to be true, his remedy is at law, and not in this Court. Whether that is so, I shall be better able to judge when the answers are put in. In the mean time, thus much may be premised:—I can suppose a bill of this description to be filed against a single Defendant, upon which a Court of equity, though having indisputably concurrent jurisdiction with a Court of law, would not think fit to exercise that jurisdiction; but the present bill avers a combination of several Defendants, against some of whom the Plaintiff may have a direct remedy at law, while against others he may have no remedy at law, or no remedy except by as many separate actions of deceit as there are parties Defendants to the suit. The bill avers—whether truly or not, it is impossible at present to say—that the several Defendants have combined to practise jointly this scheme of deceit, one (*Castello*) being put forward, but as the agent, and for the benefit, of all the rest. If those averments are true, I apprehend, it is a proper case for relief in this Court. Whether they are true, is a question which the Court will have an opportunity of sifting when the answers are put in; and the circumstance, that, by the present practice of Courts of common law, the Plaintiff might have obtained discovery at law as to the truth or falsehood of the averments, cannot oust the jurisdiction which previously existed, as I cannot doubt, in this Court, to compel such discovery.

For these reasons—as regards the Defendants other

than the company, I am of opinion that it would not be right to dispose of this case upon demurrer. Therefore, in allowing their demurrers upon the first ground to which I have adverted, I shall give the Plaintiff leave to amend.

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ALLOW the demurrer of the Defendants the company. Allow also the demurrers of the other demurring parties, but with leave for the Plaintiff, as against such last-mentioned parties, to amend. Reserve question of costs.

Minute of
Decree.

6 CP 135
2 J. H. 621

L.R. 3 H.L. 104 FITZGERALD v. CHAMPNEYS.

THE bill was filed by the Rev. John Fitzgerald, the minister of *Camden Chapel*, in the parish of *St. Pancras, Middlesex*, styling himself, and claiming to be, "the incumbent of the new parish or district of *Camden Town*, in the county of *Middlesex*," against the Rev. William Weldon *Champneys*, the incumbent of the parish of *St. Pancras*, with a view to establish an exclusive right claimed by the Plaintiff, as incumbent of such alleged new parish, to

July 15th, 18th,
& 17th.

Statutes, In-
terpretation of
—General
Acts—Special
Acts—Local
Acts—Church
Building Acts
—58 Geo. 3,
c. 45—59 Geo.
3, c. 134—
2 & 3 Vict.
c. 49—14 & 15
Vict. c. 97,
sec. 21—
19 & 20 Vict.
c. 104—Order

in *Council ultra Vires—Parishes—District Churches or Chapels—Marriages and Burials—Fees—St. Pancras.*

The rule of construction, that a general Act of Parliament does not repeal or affect a prior special Act of Parliament without express words of reference, applies to the Church Building Acts.

Therefore, the local Act, 56 Geo. 3, cap. xxxix., for regulating the ecclesiastical arrangements of the parish of *St. Pancras*, was held not to be affected by the 2 & 3 Vict. cap. 49. And an order in council, purporting, under the third section of the latter, with the consent of the Bishop alone, upon the representation of the Ecclesiastical Commissioners, to order the assignment of a district to a parochial chapel built under the former Act—*Held, ultra vires.*

The insertion in a general Act of Parliament of a saving clause, providing, that the Act shall not apply to a special case which had previously been regulated by a special Act of Parliament not otherwise referred to, will not prevent the application of the rule of construction mentioned above.

The Church Building Act, 14 & 15 Vict. cap. 97, sec. 21, explained; vide *infra*, p. 60.

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publish banns of matrimony, and to solemnize marriages between persons usually resident in such alleged parish, and to receive the fees for his own use.

In the year 1816, the parish of *St. Pancras* contained, in addition to the then parish church, a parochial chapel, called *Kentish Town Chapel*.

In that year, and subsequently, various local Acts of Parliament were passed for regulating the ecclesiastical affairs of the parish.

The first of these local Acts (56 Geo. 3, cap. xxxix.) was intituled "An Act for building a new Parish Church and a Parochial Chapel, in the parish of *St. Pancras*, and for other purposes relating thereto." It began by reciting, that the parish of *St. Pancras* had of late greatly increased in population; that the then parish church and parochial chapel (*Kentish Town Chapel*) were inadequate to the accommodation of the inhabitants; and that it would be of great convenience to the inhabitants, if a new parish church were erected on a larger scale and in a more central situation, and also if a new parochial chapel were erected within the parish. Then, by the first section, certain persons in the Act named and their successors were appointed trustees for putting the Act into execution: by the 21st section the said trustees were empowered to purchase lands within the parish for the purpose of erecting thereon a new parish church and a parochial chapel: by the 38th section the trustees were required to cause to be erected on some part of the lands so purchased a new church and a chapel in manner therein mentioned: and by the 42nd section it was enacted, that such new church, when built, completed, and consecrated, should from thenceforth be for ever called and known by the name of, and should to all intents and purposes be "the parish church of the parish

of *St. Pancras*, in the county of *Middlesex*;" that Divine service, the solemnization of matrimony, burial of the dead, and all other matters and things whatsoever which were or of right had been used to be celebrated, solemnized, administered, had, done, or performed, in the parish church should, after the consecration of the new church, be celebrated, &c., in such and the like manner in the new church and vaults under the same, any law, statute, usage, or custom to the contrary notwithstanding. By the 43rd section it was enacted, that the then vicar of the parish should be the minister of the new church, and that, from and after the death or avoidance of the then vicar, the person, and his successors respectively, to be nominated and appointed as therein mentioned to be the minister and ministers of the new church should, after such nomination and appointment, be ministers successively of such new church, and should have and enjoy such oblations, mortuaries, Easter offerings, glebes, tithes, profits, commodities, and other ecclesiastical dues and duties arising within the parish as the then vicar was entitled to have and enjoy. By the 44th section it was enacted, that, after the new church should be consecrated, the original parish church should be known by the name of and be "The Parish Chapel of the Parish of *St. Pancras*," and that the usual Divine service should be had therein, and also such other duties as the vicar of the parish for the time being should think fit to direct and appoint, except only the solemnization of matrimony, and the publication of banns of marriage, and otherwise as thereafter mentioned. By the 45th section it was enacted, that, after the said new intended chapel should be completed and consecrated, the same should from thenceforth and for ever thereafter be called and known by the name of "*Camden Chapel* in the parish of *St. Pancras*," and that the usual Divine service should be had and performed therein, and also such other ecclesiastical duties as the vicar of the parish for the time

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being should think fit to direct or appoint, except only the solemnization of matrimony, and the publication of banns of marriage, and otherwise as in the Act afterwards mentioned. By the 46th section it was enacted, that, after the new parish church should have been completed and consecrated, and also after the chapel so to be erected should have been consecrated, it should be lawful for the vicar of the parish for the time being to nominate under his hand and seal, to and for the approbation of the dean and chapter of *St. Paul's*, or to the person for the time being entitled to the advowson of the church of the parish, and having the right of nominating and appointing the minister to the then parish church, two fit persons, being in priest's orders and producing the customary testimonials, and who should reside within the parish, to be licensed as assistant ministers to officiate in the then church, by that Act directed to be called "the parish chapel," and in the chapel so to be erected: and so toties quoties. The 47th section was as follows:—"That, for the maintenance and support for the time being respectively of such minister to the present church, to be called 'the parish chapel,' and also of the minister to the said chapel so to be erected, the said trustees shall, by and out of the fees to be received and the rates directed to be made under and by virtue of this Act, yearly, and every year, well and truly pay, or cause to be paid, to each of such ministers or curates respectively for the time being, any sum not less than £150 nor more than £200 per annum, without any deduction or abatement whatsoever." By the 48th section it was enacted, that the ministers of the chapels, or the vicar when he should see fit, should read prayers and preach in the chapels on the days and at the times therein mentioned, and also should perform such other duties as the vicar of the said parish for the time being should think fit to direct or appoint, except the solemnization of matrimony, and publication of banns of marriage, and otherwise

as thereafter mentioned. By the 49th section it was enacted, that no christening or christenings should, at any time, be solemnized within the said chapels respectively without the special leave of the vicar previously obtained; but all such christenings should, in every instance, be performed (unless such leave were obtained) in the new church as theretofore performed in the then parish church. And by the 50th section it was enacted, that the vicar, churchwardens, clerk, and sexton of the parish for the time being should respectively have, receive, take, and enjoy the like burial fees, dues, and profits in respect of the burials, monuments, tombs, and other stones to be had, erected, or placed within the intended church, and chapels, and vaults, as were then payable to the vicar, &c., in respect of the burials, &c., within the then church or burial-ground of the parish.

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Subsequently to the passing of this Act, and before the passing of the second local Act with reference to the ecclesiastical affairs of the parish of *St. Pancras*, two general Acts were passed relating to church building, viz. the 58 Geo. 3, c. 45, intituled, "An Act for building and promoting the building of Additional Churches in Populous Parishes;" and the 59 Geo. 3, c. 134, intituled, "An Act to amend and render more effectual the Act" last mentioned.

By the first of these general Acts, commissioners (who were subsequently constituted a body corporate by the name and title of "His Majesty's Commissioners for building New Churches") were appointed, with a power (inter alia) of making a representation to the king in council, proposing, with the consent of the bishop of the diocese, that a parish should be divided into ecclesiastical districts. This power, given by the 21st section of the Act, will be found set out in full in the judgment (a).

(a) *Infra*, p. 50.

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By the second general Act (59 Geo. 3, c. 134) it was enacted, by the 16th section, that it should be lawful for the commissioners, in the same manner and with the like consents as were required in case of division into ecclesiastical districts under the former general Act or this Act, to assign a particular district to any chapel of ease or parochial chapel then already existing, or to any chapel built, or which might thereafter be built or acquired, under the powers of the former general Act or this Act.

Two years after the passing of the last of these general Acts, the second local Act was passed with reference to the ecclesiastical arrangements of the parish of *St. Pancras*.

This Act (the 1 & 2 Geo. 4, c. xxiv.) was intituled, an Act for (inter alia) altering and enlarging the powers of the former local Act (56 Geo. 3, c. xxxix.). It recited that Act, and that, by the two subsequent general Acts, 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, the Commissioners for building New Churches were empowered to make grants for building churches or chapels, and to call upon any parish to furnish sites for the erection of any churches or chapels to be so built, and that the church rates of every such parish were charged with the repayment of the money expended by the parish in providing sites, and of all such sums of money expended or advanced under the provisions of the said two last-mentioned Acts, or one of them; and the churchwardens were to make rates for repaying the same. It then recited, that the commissioners determined to build two new chapels in the parish of *St. Pancras*, upon sites to be provided by the parish, and of which the commissioners had signified their approval; that, from the peculiar circumstances of the parish of *St. Pancras*, it would be very inconvenient to make a specific rate for the payment of the moneys agreed on for the purchase of the said sites, or for any other purpose for

which any such rates might be required according to the directions of the two last recited Acts of Parliament; and it would be more convenient, if the trustees of the Act 56 Geo. 3, c. xxxix., were authorized to raise and pay all such moneys out of the funds to be raised for the purposes of this Act; and it would tend to the more uniform management and regulation of the ecclesiastical affairs of the said parish, if all the parochial chapels then existing, or thereafter to be built therein, were made subject to the same powers of the trustees and the same directions and regulations as, by and in the said Act of the 56 Geo. 3, c. xxxix., were or were intended to be given and contained as to the new parish church and the said parochial chapel, intended to be called *Camden Chapel* (subject, nevertheless, to the general control and superintendence of the commissioners, and such of the directions and provisions of the said Acts of the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134, as were not intended to be by the now stating Act altered or varied, so far as might respect the two chapels then about to be erected by the commissioners, or any other chapels or ecclesiastical buildings or improvements which might thereafter be made under their direction or authority). After these recitals, it was by the fifth section enacted, that the Act of the 56 Geo. 3, and all and every the clauses, powers, provisions, matters, and things whatsoever therein contained and then in force (except such parts of the same as were by the now stating Act varied or repealed) should be, continue, and remain, and were thereby declared to be and continue in full force and effect, and together with the now stating Act and for the purposes of the said recited Act and the now stating Act, and should be executed as fully and effectually in all respects, and to all intents and purposes, as if the said recited Act, and all the clauses, &c., therein contained, and then in force, were expressly repeated and re-enacted in the body of the now stating Act. By the 9th section, the trustees were empowered to borrow

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money for the purposes of the two local Acts upon the credit of the rates and pew rents and otherwise. By the 17th section, they were empowered to make rates. By the 28th section it was enacted, that all the several parochial chapels then existing within the parish of *St. Pancras*, and also the chapels then about to be erected by the commissioners, and all other parochial chapels which should thereafter be erected within the parish, should be subject to all the same powers, clauses, and provisions, as were contained in the first local Act (56 Geo. 3, c. xxxix.) with respect to *Camden Chapel*; and it should be lawful for the trustees to exercise the same accordingly, in like manner as if such powers, clauses, and provisoes were in the now stating Act contained and enacted of and concerning all such chapels (save and except so far only as the same were by the now stating Act altered or varied): Provided that all such powers and provisoes, and all other the powers, matters, and things by the now stating Act given, created, and provided for (so far as the same might affect or relate to the two chapels then about to be built, or any other chapel which might thereafter be erected by the commissioners,) should be exercised, or done, and executed with and under the control and management of the commissioners, or their successors, and should be subject to the provisions and regulations of the 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, so far as the same were not by the now stating Act altered or varied. And by the 51st section it was enacted, that the pew rents of the new parish church, and of all the parochial chapels which then were or thereafter should be within the said parish, and which were, by the now stating Act and the Act 56 Geo. 3, c. xxxix., placed under the management of the said trustees (except the chapels and ecclesiastical buildings to be erected by the commissioners, and subject and without prejudice to any appropriation of such rents

made by the Act 56 Geo. 3, c. xxxix. so far as the same might extend, and subject and without prejudice to any mortgage or charge then already made upon the same, and otherwise as therein mentioned,) should be applied as follows (that is to say), the salaries, stipends, or allowances of the ministers who should do any duty in the said chapels respectively, and of any lecturer or lecturers who might be appointed by the vicar for the time being to preach lectures in the parish church, and of the clerks and other persons who should be employed in the said church and chapels respectively, should be thereout first paid and discharged: Provided that such salaries, &c., should be respectively paid by and out of the pew rents of the church or chapels in respect of which the same should arise, if such pew rents should be sufficient for that purpose; but if the same should not be sufficient, then the deficiency should be made good out of any surplus of the general pew rent fund; and the interest of any money borrowed, or to be borrowed, on the credit of the said pew rents, under the authority of the said local Acts, should be thereout paid in the first place.

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After the passing of both the local Acts, in the year 1839, the General Church Building Act of the 2 & 3 Vict. c. 49, intituled, "An Act to make better provision for the assignment of Ecclesiastical Districts to Churches or Chapels augmented by the Governors of the Bounty of Queen Anne, and for other purposes," was passed. This Act, by the third section (being the section upon which the question in this suit was held to turn), declared and enacted, that it should be lawful for the Commissioners for building New Churches to assign a district chapelry to *any church or chapel*, with such consent as is required by the Acts of the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134, or one of them, in the manner specified and directed in and by such several Acts.

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In the year 1851 the then vicar of *St. Pancras*, having represented to the Commissioners for building New Churches that it would be for the spiritual benefit of the parish of *St. Pancras* that districts should be assigned to the chapels built in pursuance of the local Acts, the commissioners prepared and laid before Her Majesty in council, with the consent of the bishop under his hand and seal, a representation, stating, that, having taken into consideration all the circumstances of the parish of *St. Pancras*, it appeared expedient to them that a particular district, with boundaries therein described and delineated in a map, should, under the powers contained in the 16th section of the 59 Geo. 3, c. 134, and the 3rd section of the 2 & 3 Vict. c. 49, be assigned to *Camden Chapel*, and should be called "the district chapelry of *Camden Town*."

By an order in council, dated the 26th of December, 1851, Her Majesty, with the advice of her Privy Council, approved of the recommendation of the commissioners, and ordered, that the assignment therein proposed should be made and carried into effect, agreeably to the provisions of the Acts therein mentioned.

In the year 1856 the "New Parishes Act, 1856"(a)

(a) This Act, by the 11th section, empowers the commissioners (then called "The Ecclesiastical Commissioners for England"), upon application of the incumbent "of any church or chapel to which a district shall belong," with the consent of the bishop, to make an order, under their common seal, authorizing the publication of banns of matrimony and the solemnization therein of marriages, baptisms, churchings, and burials; and enacted, that all the fees payable for the perform-

ance of such offices should be paid to the incumbent of such district.

The 12th section enacts, that, in every case in which all or any part of the fees or other ecclesiastical dues arising within the limits of any district, or payable in respect of marriages, baptisms, churchings, and burials, in the church or chapel thereof, or of such fees as are thereby made payable to the incumbent of any district, shall have been reserved, or, if such last-mentioned order had not been made,

(19 & 20 Vict. c. 104), known as Lord *Blandford's* Act, was passed.

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would of right belong to the incumbent of the original parish, district, or place, out of which the district of such church or chapel shall have been taken, or to the clerk thereof: an account of such fees shall be kept by the incumbent of such church or chapel, who is thereby required to receive, and every three months pay over, the same to the incumbent and clerk, respectively, who would have been entitled to them in case such districts had not been formed; and from and after the next avoidance of such incumbency, or the relinquishment of such fees by such incumbent, and after the situation of such clerk shall have become vacant, or after a compensation in lieu of fees has been awarded to such clerk by the bishop of the diocese, which he is thereby empowered to do, such reservation shall altogether cease and determine, and all such fees and dues shall belong to the incumbent of the district within which the same shall arise, or to the clerk of the church thereof.

The 14th section enacts, that whosoever, or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms are authorized to be published and performed in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the

incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices, without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the statute 6 & 7 Vict. c. 37, and the church or chapel of such district shall be the church of such parish, and all and singular the provisions of the statutes 6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94, as amended by this Act, relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church, as fully and effectually, as if the same had become a new parish under the provisions of the said last-mentioned Acts.

The 15th section enacts, that the incumbent of every new parish created, or thereafter to be created, pursuant to the provisions of the said Acts, 6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94, or of this Act, shall, saving the rights of the bishop of the diocese, have sole and exclusive cure of souls, and the exclusive right of performing all ecclesiastical offices within the limits of the same for the resident inhabitants therein, who shall, for all ecclesiastical purposes, be parishioners thereof, and of no other parish; and such new parish shall, for the like pur-

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On the 25th of November, 1858, the Ecclesiastical Commissioners, purporting to act in pursuance of "the New Parishes Act, 1856," with the consent of the bishop, made an order, upon the application of the Plaintiff, (described in the order as "incumbent of *Camden Town Chapel, to which a district belongs,*") purporting to authorize the publication of banns of matrimony and the solemnization of marriages, baptisms, and churchings, in the church of the said church or chapel.

On the 10th of July, 1860, the incumbency of the parish church was avoided, and the Defendant was presented thereto.

In April, 1861, the Plaintiff filed his bill against the Defendant, submitting, that, under the 12th and 14th sections of the New Parishes Act, 1856, the district chapelry of *Camden Town* became, upon this avoidance, "the new parish of *Camden Town,*" and that *Camden Chapel* became the parish church of such new parish; and charging, that the Defendant had frequently, since he became incumbent, published banns and solemnized marriages in the parish church between persons whose only places of residence were at the time within the boundaries of the new parish or district of *Camden Town* aforesaid, and had received the fees for the same respectively; that the Defendant had retained for his own use the surplice fees in respect of the interment of the bodies of persons removed from the said new parish in cemeteries other than those provided under the local Acts, and had collected and received,

poses, have and possess all and the same rights and privileges, and be affected with such and the same liabilities as are incident or belong to a distinct and separate parish, and to no other liabilities. Provided always, that nothing

therein contained shall be taken to affect the legal liabilities of any parish regulated by a local Act of Parliament, or the security for any loan of money legally borrowed under any Act of Parliament or otherwise.

within the limits of the said new parish, Easter offerings and other ecclesiastical dues.

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The Plaintiff prayed, by his bill, that it might be declared, that the district, described in the order in council of the 26th of December, 1851, as the district chapelry of *Camden Town*, became, on the avoidance of the vicarage, a new parish, by the name of "the new parish of *Camden Town*;" and that the Plaintiff, as the incumbent of such new parish, was solely entitled to publish banns of matrimony and to solemnize marriages between persons usually resident in such parish; and that the Plaintiff, as such incumbent, was entitled to receive for his own use and benefit the fees payable in respect of such marriages, and also all surplice fees payable in respect of the interment of the bodies of persons removed from the new parish of *Camden Town* for the purpose of interment in the cemeteries or burial grounds before mentioned, and was solely entitled to collect and receive for his own use and benefit all Easter offerings and other ecclesiastical dues payable and paid by persons residing within the boundaries of the said new parish of *Camden Town*: and for an account and payment by, and an injunction against, the Defendant, founded upon this declaration.

Mr. *Willcock*, Q.C., Mr. *J. C. Traill*, and Mr. *Brandt*, for the Plaintiff, contended, that, under the order in council of the 26th of December, 1851, and the order of the Ecclesiastical Commissioners of the 25th of November, 1858, the district chapelry, upon the avoidance of the incumbency of *St. Pancras*, in July, 1860, became, by the operation of the "New Parishes Act, 1856" (a), the new parish of *Camden Town*; and that the Plaintiff was en-

Argument.

(a) Set out *suprà*, p. 40, note.

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titled to publish banns of marriage, and solemnize marriages therein as mentioned in the prayer of his bill.

Argument.

Assuming, that, at the date of the commissioners' order (25th of November, 1858), the Plaintiff was, within the words of the 11th section of the New Parishes Act, 1856, "the incumbent of a chapel to which a district belonged," the right he claims follows indisputably from the 12th, 14th, and 15th sections. The question, whether at that date the Plaintiff was such an incumbent, depends on the validity of the previous order in council, which ordered the assignment of a district to his chapel.

Now, the validity of the order in council is clear, assuming that the provisions of the general Church Building Acts, under which it purports to be made (the 59 Geo. 3, c. 134, s. 16, and the 2 & 3 Vict. c. 49, s. 3), were applicable to chapels in the position of *Camden Chapel*, equally with chapels generally.

We contend, that they were so applicable—the words of the 2 & 3 Vict. c. 49, s. 3, being express and comprehensive:—"It shall be lawful for the commissioners to assign a district chapelry to any church or chapel with such consent as is required by the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134, or one of them, in the manner specified and directed in and by such several Acts."

The Defendants will deny, that the general Acts are applicable, upon the ground, that, before they were passed, the chapel in question had, by the local Acts of the 56 Geo. 3, c. xxxix., and 1 & 2 Geo. 4, c. xxiv., been made the subject of special legislation. But "*Leges posteriores priores contrarias abrogant.*" Here, the general statutes, equally with the previous local statutes, are affirmative; and every affirmative statute is a repeal of a precedent

affirmative statute, where, as here, its matter necessarily implies a negative: *Dwarris's* "Treatise on Statutes" (a). Where, as here, the later statute is clearly and indisputably contradictory and contrary to the former Act, and the repugnancy such that the two cannot be reconciled, the latter necessarily repeals the earlier enactment (b); and accordingly, in *Regina v. The Inhabitants of St. Edmund's, Salisbury* (c), Lord Denman, C.J., says, "While we hold, that a positive enactment is not to be restrained by inference, we must also act on the maxim, 'Leges posteriores priores contrarias abrogant,' whenever it comes in operation." Where a general intention is expressed, and the Act also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception: *Dwarris's* "Treatise on Statutes" (d).

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The VICE-CHANCELLOR.—Can rights conferred by Act of Parliament be devested by a later Act without express reference? Judging from the second local Act, the Legislature does not seem to have considered that they could. The second local Act (1 & 2 Geo. 4, c. xxiv.) was not passed until after two of the General Church Building Acts had become law, yet, so far from treating the first local Act as repealed by the general Acts, it expressly recognises it as left by them in full force. The 51st section takes a marked distinction between the powers of the trustees under the former local Act and those of the commissioners under the general Acts.

(a) Ed. 1848, pp. 530, 531.
But see the context.

(b) Id. 531. But here, also,
see the context.

(c) 2 Q. B. 84.

(d) Page 514. But see the context, and particularly the passage cited from Lord Kenyon, *Williams v. Pritchard*, 4 T. R. 2, 4.

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Mr. *Willcock*.—It is no part of our case, that any rights are devested by the general Acts or any of them. All we contend is, that, by those Acts, powers are given to the Ecclesiastical Commissioners, which, at the date of the earlier local Acts, the Legislature had not thought of conferring in the case of any parish.

[He cited, *Jackson v. Courtenay*(a); *King v. Alston*(b); and *Hughes v. Denton*(c).]

Mr. *Giffard*, Q.C., and Mr. *Lindley*, for the Defendant, contended, that the Plaintiff's bill must be dismissed.

The Plaintiff admits that his right to a decree depends upon the single issue, whether the order in council was valid, and that he has no case if the Court should be of opinion that the order in council was ultra vires. We contend that the order in council was ultra vires and invalid. It was based upon the assumption, that the General Church Building Acts applied to chapels built under and regulated by earlier special Acts, to which, throughout the general Acts, there is not the most distant allusion. This assumption we dispute. "Generalia specialibus non derogant:" *Jenkins*, "Third Century," case 41 (d). Even a special statute does not derogate from a special statute without express words of abrogation, *Jenkins*, "Fifth Century," case 11 (e); *The Trustees of the Birkenhead Docks v. Laird* (f); *The London and Blackwall Railway Company v. The Board of Works of the Limehouse District* (g); *Hawkins v. Gathercole* (h). At any rate, the law will not allow a statute to revoke or alter, by construction

(a) 8 Ell. & Bl. 8.

(b) 12 Q. B. 971, 984.

(c) 5 C. B., N. S., 765.

(d) Ed. 1734, p. 120.

(e) Ibid. p. 198.

(f) 4 De G., M., & G. 732, 742; S. C. 18 Jur. 884.

(g) 3 Kay & J. 123, 127.

(h) 6 De G., M., & G. 1, 31.

of general words, any prior statute, when the words may have their proper operation without it(a).

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The VICE-CHANCELLOR (to Mr. *Willcock*).—The Fines and Recoveries Abolition Act (b) enables “every actual tenant in tail” to bar the entail and dispose of lands for an estate in fee simple, “as against all persons, including the King’s Most Excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail.” But would those words, large as they are, reach cases of entail by special Act of Parliament—such, for instance, as the Duke of *Marlborough’s* or the Duke of *Wellington’s* entail?

Mr. *Willcock*, in reply, contended, that the cases were not parallel. The policy of the law, in the case of entails by special Act of Parliament for public service, remained the same at the passing of the Fines and Recoveries Act, as when those entails were created. It was no part of the object of the Fines and Recoveries Act to do away with entails which, at the passing of the Act, were expressly forbidden by the Act of Parliament to be barred, but only to substitute a more simple mode of barring those which were not forbidden by any law to be barred. With the Church Building Acts it was otherwise. They were intended to provide, with a view to the better regulation of ecclesiastical affairs generally, a scheme which when earlier local Acts were passed, had not been thought of or could not have been attempted; as such, they must have been, as their language implied they were, intended for the community at large; and the accident, that any particular parish had previously been brought within the scope of partial and imperfect legisla-

(a) 6 De G., M., & G. p. 8, and notes.

(b) 3 & 4 Will. 4, c. 74, sec. 15. But, on this point, see sec. 18.

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tion, could never have been intended by Parliament to deprive it for all time of the benefit of that more comprehensive system in which all other parishes were to be at liberty to participate.

Judgment. VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question in this case, although a very full and elaborate argument has been had upon it, is brought within extremely narrow limits. That question, as it seems to me, is whether the general public Act of the 2 & 3 Vict. c. 49, intituled, "An Act to make better provision for the assignment of Ecclesiastical Districts to Churches or Chapels augmented by the Governors of the Bounty of Queen *Anne*, and for other purposes," does or does not repeal or overrule the provisions contained in certain local Acts which have been passed for the parish of *St. Pancras*, with reference to the chapels contained in that parish, and in particular with reference to *Camden Chapel*.

The first of these local Acts, the 56 Geo. 3, c. xxxix., is an Act of a very precise character. After reciting that it was the object of the Legislature, in passing the Act, to authorize the building of a new parish church and chapel of ease, and the conversion of the original parish church into a chapel, to be called "the parish chapel," (which, with the *Kentish Town Chapel* then existing, and the intended new chapel of ease, to be called "*Camden Chapel*," would form three chapels of ease, with one parish church), the Act contains a complete, elaborate, and somewhat minute arrangement with reference to the position of the vicar of the parish church, and the clergy-men who are to officiate in, (or, as they are styled in that Act, "the ministers to,") the parish chapel and *Camden*

Chapel. The vicar is to be the incumbent of the parish church. The ministers to the parish chapel and *Camden Chapel* are to be licensed and irremovable curates; and their stipends are to be paid by the trustees, out of burial rates and pew rents, in the manner provided by the 47th section. [His Honour read the section (a).] But, in all other respects, they are to be entirely under the control of the vicar of the parish church for the time being. They are to be nominated by the vicar for the licence of the bishop; and they are to perform in their several chapels, in addition to the duties specified in the Act, "such other duties as the vicar of the said parish, for the time being, shall think fit to direct or appoint, except the solemnization of matrimony and publication of banns of marriage,"—which even the vicar does not seem to have been intrusted by the Act with the power of delegating.

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Such being the relative positions of the vicar of the parish church and of the ministers of these chapels of ease, as determined by the local Act,—the General Public Act of the 58 Geo. 3, c. 45, intituled "An Act for building and promoting the Building of additional Churches in Populous Parishes," is passed—the Act which constituted the body long known as "The Church Building Commissioners."

By this Act, the Church Building Commissioners had large general powers given to them.

First, they had, under the 13th section, the power of making grants for building churches in populous parishes,—the power from which they appear to have derived their name.

Secondly, they had powers for making representations to the king in council, proposing that districts should

(a) Set out *suprà*, p. 34.

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be set apart for the churches which might so be built. These powers were twofold, and might be exercised in a twofold manner according to the discretion of the commissioners. Either, under the 16th section, the commissioners, where they were of opinion that it would be expedient, might recommend the division of a parish "into two or more *distinct and separate parishes* for all ecclesiastical purposes whatever;" or, where they should be of opinion that such a division would not be expedient, they might recommend, that the parish should be divided into "*ecclesiastical districts*," under the 21st section. In the former case, the consent of the patron, as well as that of the bishop, was required; in the latter, the consent of the bishop alone was sufficient.

It is upon this latter power—the power given by the 21st section of dividing parishes into "*ecclesiastical districts*"—that the Plaintiff relies in the case before me. The 21st section, therefore, is the one principally material to notice.

That section enacts, "That, in any case in which the said commissioners shall be of opinion that it is not expedient to divide any populous parish or extra-parochial place into such complete, separate, and distinct parishes, as aforesaid, but that it is expedient to divide the same into such ecclesiastical districts as they, with the consent of the bishop, signified under his hand and seal, may deem necessary for the purpose of affording accommodation for the attending Divine service, according to the rites of the United Church of *England and Ireland*, to persons residing therein, in the churches and parochial chapels already built, or in additional churches or chapels to be built therein, and as may appear to such commissioners to be convenient for the enabling the spiritual person or persons who may serve such churches or chapels, to perform all ecclesiastical duties within the districts attached to such respective churches and chapels, and for the due ecclesiastical superintendence of such district, and

the preservation and improvement of the religious and moral habits of the persons residing therein,—the said commissioners shall represent such opinion to His Majesty in council, and shall state in such representation the bounds by which such districts are proposed to be described; and if, thereupon, His Majesty in council shall think fit to direct such division to be made, such order of His Majesty in council shall be valid and good in law for the purpose of effecting such division.”

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Where the commissioners are of opinion that a division into ecclesiastical districts even is not expedient, they have discretionary powers of building additional chapels, of causing curates to be appointed to such chapels by the incumbents of the respective parishes, and of assigning the salaries for such curates. The latter part of the 21st section enacts, that, “ In any case in which the said commissioners shall be of opinion that it is not expedient to make any such division into such ecclesiastical districts as aforesaid, the commissioners may build, or aid the building, of any additional chapels in any such parishes or extra-parochial places, to be served by curates, to be respectively nominated and appointed by the respective incumbents of the churches of the respective parishes or extra-parochial places, and licensed by the bishop of the diocese, such curates to be paid such salaries as shall be assigned by the said commissioners, under the provisions of this Act, in manner hereinafter directed.”

Various other consequences are to follow, according to the provisions contained in other parts of the Act, in all cases where churches or chapels are appropriated to district parishes made under the Act. Thus, the 25th section enacts, “ That every church and chapel built or acquired under the provisions of this Act, and appropriated to any such district parish so made under the provisions of this Act, shall be deemed a perpetual curacy, and shall be

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considered in law as a benefice presentative, so far only as that the licence thereto shall operate in the same manner as institution to any such benefice, and shall render voidable other livings in like manner as institution to any such benefice; and the spiritual person serving the same shall be deemed the incumbent thereof." And the section then goes on to enact, that such incumbents shall have perpetual succession, and shall be bodies politic and corporate, and may receive endowments in land; and that all such incumbents, and all persons presenting or appointing such incumbents, shall be subject to all jurisdictions and laws, ecclesiastical or common, and to all provisions, regulations, penalties, and forfeitures, contained in any Act of Parliament in force relating thereto respectively; and such presentations shall lapse like actual benefices.

The 26th section (which is less material) enacts, that no such district church or chapel shall be held with the original church.

And the 27th section (which is important) enacts, "That all Acts of Parliament, laws and customs, relating to publishing banns of marriage, marriages, christenings, churchings, and burials, and the registering thereof, and to all ecclesiastical fees, oblations, or offerings, shall apply to such separate and distinct parishes and district parishes, when they shall so become complete, separate, and distinct parishes or district parishes, under the provisions of this Act, after the death, resignation, or other avoidance of the existing incumbents respectively, in each such parish or extra parochial place, and to the churches and chapels thereof, and to the ecclesiastical persons having cure of souls, or serving the same, in like manner, in every respect, as if the same respectively had been ancient, separate, and distinct parishes and parish churches by law, to all intents and purposes."

Then there are certain provisions regulating how banns shall be published and marriages solemnized; and there are arrangements also with reference to the fees, in case there

should be such separation of the parish into a district parish.

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Now, provisions such as these in the general Act are wholly inconsistent and at variance with the complete, elaborate, and minute arrangement made, as I began by showing, in the local Act, with reference to the parish of *St. Pancras*, by which the vicar of that parish for the time being was to have the entire control I have described over the ministers of the two chapels, directing what duties they should perform in their chapels; nor are they less at variance with the section which fixes the stipend of those ministers at a sum not less than £150, nor more than £200, to be paid by the trustees appointed under the Act. This is manifest, and there is no attempt on the part of the Plaintiff to deny it.

If, therefore, the case rested upon the first local Act (the 56 Geo. 3, cap. xxxix.), standing alone, the question of law would arise which was discussed before the Lords Justices in *The Trustees of the Birkenhead Docks v. Laird and the Birkenhead Dock Company* (a), namely, whether a special Act of Parliament, creating special rights or imposing special duties, is to be considered as repealed by a subsequent general Act, which makes no reference to it. All the reasoning applicable to the cases there cited (b) by Lord Justice Turner from Judge Jenkins's Reports

(a) 4 De G., M., & G. 732; S. C. 18 Jur. 883; and see 3 Kay & J. 127.

(b) This citation is omitted, and it would seem intentionally, as less in point than another case in *Jenkins* (5th Century, ca. 11) by L. J. Turner, in the authorized report, 4 De G., M., & G. 742. It is given, but incorrectly, in the "Jurist," (vol. 18, p. 884), from which it was cited in the repor

of *The London and Blackwall Railway Co. v. The Board of Works for the Limehouse District*, 3 Kay & J. 127, which the reader is requested to correct as follows:—In 3 Kay & J. 127, line 5 from the bottom, for "lives" read "life;" and, at line 4 from the bottom, for "their" read "three."

The correct version is given in the text, *infra*, p. 54.

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applies quite as strongly to the case before me. One of those cases (as reported by Judge *Jenkins*) is as follows:—
 “An Act of Parliament ordains that *A. B.*, who is tenant in tail, shall only make leases for life. The statute of 32 Hen. 8, which enables tenant in tail to make leases for three lives, does not repeal the said Act, for the reason aforesaid”—referring to the maxim he had previously quoted, “*Generalia specialibus non derogant.*”

So, to recur to the illustration I put during the argument, the Act for the Abolition of Fines and Recoveries provides, that, “*every* actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate in fee simple absolute, the land entailed, as against all persons claiming the land entailed by force of any estate tail which shall be vested in, or might be claimed by, or which, but for some previous act, would have been vested in, or might have been claimed by, the person making the disposition at the time of his making the same, and also as against all persons, including the King’s most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail;” yet no one could argue successfully, that those words, large as they are, would affect the entails made by special Acts of Parliament, such as the *Marlborough*, the *Wellington*, or the *Shrewsbury* entails (*a*).

And the reason in all these cases is clear. In passing the special Act, the Legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and, having so done, they are not to be considered, by a general enactment passed subsequently, and making no mention of any such intention, to

(*a*) But see section 18 of the and Recoveries (3 & 4 Will. 4, Act for the Abolition of Fines c. 74).

have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated.

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It was argued, that there is a manifest absurdity in supposing, that, while all other districts and all other persons are to enjoy the benefits which the Legislature intended to confer by the general enactments of the 58 Geo. 3 and the 59 Geo. 3, for the building of additional churches in populous parishes, the persons who happen to be connected with these particular chapels—the parish chapel and *Camden Chapel*—and their neighbourhoods, are to be excluded for all time from participating in those benefits merely because in former times those chapels were the subject of special legislation. But the answer is clear:—So far as the general Acts do not interfere with the special Act—so far as the arrangements made by the general Act do not clash with the arrangements made by the special Act, the persons connected with these chapels will participate in the benefits in question. And they have done so already: already the commissioners have built churches in the district under the powers of these general Acts; and, so far as I am at present advised, I see nothing to prevent the assignment of districts to the churches so built, or to any other church not affected by the special Acts. Beyond these limits—so far as the general Acts and the arrangements thereby made do interfere with the arrangements made by the special Acts—the persons connected with these chapels will be excluded from the benefits of the general enactments: but only so long as Parliament chooses to abstain from expressing an intention to the contrary. If Parliament considered the arrangements made by the special Act injudicious, it could, in the next or the same session, alter those arrangements. If Parliament considered it desirable to include in the provisions of the general Act all the persons affected by the provisions of the special Acts, they

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would express their intention that the special Acts should be abrogated. The only question, therefore, is, whether Parliament has thought fit to express an intention, that these special Acts should be abrogated.

An instance in which Parliament has thought fit to express such an intention with regard to special Acts of this description occurs in Lord *Blandford's* Act (19 & 20 Vict. cap. 104) the first section of which is as follows:—
 “It shall be lawful to constitute districts under the provisions of the said Acts, notwithstanding there may be within the limits of any such district a consecrated church or chapel, *any local Act to the contrary notwithstanding.*”
 So, if Parliament had meant the 58 Geo. 3. c. 45, or the 59 Geo. 3, c. 134, to apply to a case regulated by a previous special Act, they would have expressed that those Acts were to be applicable, “any local Act to the contrary notwithstanding.” That is the only true and effective mode of dealing, by general enactments, with cases which have been the subject of special legislation.

Such would clearly be my decision, if the case rested upon the first local Act (56 Geo. 3, c. xxxix.) standing alone. But, when I look at the second local Act (the 1 & 2 Geo. 4, c. xxiv.), it becomes a clearer case than any of those which have been cited. When the second local Act was passed, the two general Acts, the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134, constituting the commissioners for building churches and investing them with these powers, were already law; those commissioners had determined to build two new chapels in the parish of *St. Pancras*; and yet it is the mind of the Legislature, as expressed in the second local Act (1 & 2 Geo. 4, c. xxiv.), that, “from the peculiar circumstances of the parish of *St. Pancras*,” the scheme which, by the former local Act, the Legislature had specially provided for the management and regulation of the ecclesiastical affairs of the

parish was so far preferable to the provisions of the general Acts, that, even as regards the two new chapels which the commissioners had so determined to build, it should in the main be adopted: and accordingly, by the 28th section, it is enacted, that all the chapels then existing within the parish, and also the chapels then about to be erected by the commissioners, and all other parochial chapels which should be thereafter erected within the parish, should be subject to all the powers, clauses, and provisions contained in the former local Act (56 Geo. 3, c. xxxix.) with respect to *Camden Chapel*, subject only to this proviso, that, so far as may relate to the two chapels about to be built by the commissioners, or any other chapel which might thereafter be erected or improved by the commissioners, such powers should be exercised under the control and management of the commissioners, and should be subject to all the provisions and regulations of the general Acts, so far as they are not by this Act altered or varied. As regards chapels to be built by the commissioners, the powers of the trustees were to be subject to the control of the commissioners. As regards all other chapels, the local Act was to prevail; and, that this may be beyond all doubt, it is expressly enacted by the 5th section(a).

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The provisions contained in the 51st section of the second local Act, with regard to the application of the pew rents of the parish church and all existing and future chapels in the parish, are still more inconsistent with the provisions contained in the general public Acts.

In short, from the whole scheme of the second local Act (the 1 & 2 Geo. 4, c. xxiv.), it is plain, that Parliament intended to apply, and has applied, in the interpretation of the former local Act, that principle of construction which, as I apprehend, the law will always presume in

(a) Set out *suprà*, p. 37.

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the interpretation of special Acts of Parliament, which have been followed by general enactments. Finding a special Act for regulating the ecclesiastical affairs of certain chapels in the parish of *St. Pancras*—finding a subsequent general Act, which makes no allusion to the former special Act—Parliament treats the former as neither repealed nor affected by the general enactment: and, being of opinion that certain of the provisions of the special Act could be advantageously extended to future chapels, which, as the law stood, would be beyond its operation, Parliament extends those provisions accordingly, leaving the former local Act in full force for all other purposes, and re-enacting it in order to give the full force and sanction of Parliamentary reconsideration to the whole scheme.

I come now to the Act of the 2 & 3 Vict. c. 49, upon which, no doubt, the question before me must turn. By that Act, which was passed “to make better provision for the assignment of ecclesiastical districts to churches or chapels augmented by the governors of the Bounty of Queen *Anne*, and for other purposes.” it is enacted (sec. 3), “that it shall be lawful for the commissioners for building new churches to assign a district chapelry to *any* church or chapel, with such consent as is required by the Acts of the 58 and 59 Geo. 3, or one of them, in the manner specified and directed in and by such several Acts.” The words are in the most comprehensive form—“any church or chapel.” The Act does not affect to deal with the special Act of the 56 Geo. 3, c. xxxix., for regulating the ecclesiastical affairs of the parish of *St. Pancras*; it does not say, that the attention of the Legislature has been drawn to that Act; it does not recite or in any way refer to that Act. The same reasoning, therefore, which led me to the conclusion, that the special Act was not repealed or affected by the 58 Geo. 3, c. 45, applies still more strongly to prove, that it was not repealed or affected by the Act of the 2 & 3 Vict. c. 49, in which these comprehensive words occur.

My attention was called to the fact, that, in the 58 Geo. 3, c. 45(a), and again in the 19 & 20 Vict. c. 104(b), a saving clause is inserted, providing that the general enactments of the statute shall not apply to a special case which had been previously regulated by a special Act of Parliament not otherwise referred to in the general enactment; from which an attempt was made to argue, that, if no such saving clause had been inserted, the general enactment would have applied to the special case, notwithstanding it had been previously regulated by the special Act of Parliament. But the insertion of a saving clause is never a safe ground for determining the construction of any Act of Parliament, whether local or general. We all know the anxiety which there is on the part of every one who imagines that his rights may be infringed by the passing of an Act, whether general or local, to procure the insertion of a saving clause to protect them, even where the ordinary rules of construction supersede the necessity of any such protection; and certainly, the insertion of the saving clause, to which I was referred, cannot lead me to the conclusion, that the general rule of construction, that a special Act is not repealed by a subsequent general enactment in which the special Act is not referred to, is inapplicable.

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I have already noticed the strong indication afforded by the 1 & 2 Geo. 4, c. xxiv., that the Legislature itself conceived that the previous special Act, 56 Geo. 3, c. xxxix., remained unaffected by the general enactments of the 58 and 59 Geo. 3; and I find, as late as the 14 & 15 Vict. c. 97—in an Act passed immediately before the order in council under which the assignment of a district to *Camden Chapel* professes to be made—an indication not less strong that the Legislature took that view which the Courts of law in construing Acts of Parliament have always attributed to it, namely, that a special Act is

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not interfered with by, unless specially mentioned in, a subsequent general enactment. The 21st section of the 14 & 15 Vict. c. 97, provides, that, Whenever, under and by virtue of any local Act then in force, any parish cannot be brought within the provisions of the Church Building Acts, touching the formation thereof of a parish or district, and whenever a representation is made to the said commissioners by the patron and incumbent and by the vestry, that it will be for the spiritual benefit of the parish that it should be brought within such provisions, it shall be lawful for the commissioners, with the consent of the bishop, to apply and put in execution, with respect to such parish, the powers and provisions of the Church Building Acts and that Act relative to the formation of any parish or district; and such provision shall thereupon be applicable to such parish, any local Act of Parliament to the contrary notwithstanding.

In connection with this section, I may remark, that it seems to point out a mode by which, in the particular case before me, the difficulty (if it be one) may be removed without having recourse to Parliament. It is true, that, so far as regards certain chapels in the parish of *St. Pancras*, that parish *can* (in the words of the Act) "be brought within the provisions of the Church Building Acts; but, for other purposes, and as regards other chapels (e.g. the parish chapel and the *Camden Chapel*) by virtue of the local Act, the parish "cannot be brought within the provisions of the Church Building Acts." Quoad those chapels, therefore, the case falls within the words of the 21st section; and, although a parish may be capable of being brought within the provisions of the Church Building Acts for many different purposes, still, if there is any one purpose for which, by virtue of a local Act, it cannot be brought within those provisions as mentioned in the 21st section, that section, as it seems to me, is applicable.

It appears to me, therefore, upon the general principle of construction to which I have referred—fortified by the view taken by the Legislature in the 1 & 2 Geo. 4, c. xxiv., and in the 14 & 15 Vict. c. 97, and further fortified by the circumstance, that, in Lord *Blandford's* Act, when Parliament meant to give certain powers overriding all local Acts, it expressly gave those powers, “any local Act to the contrary notwithstanding” (a)—I must hold the order in council of the 26th day of December, 1851, by which it was attempted, with the consent of the bishop alone, to assign the district in question to *Camden Chapel*, as proposed in the representation of the commissioners, to have been *ultra vires*.

The result is, that I must either dismiss the bill, or (at the option of the Plaintiff) I must retain it for twelve months, to see if he is advised to take any legal proceedings—it being a legal right which is in question.

BILL dismissed. Costs arranged.

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Minute of
Decree.

L R 36/2 672

489 45, 100, 609

764 238
30 Bea 362
32 " 193.

15 Ch D 366

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Charity—
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A testator's
share in the
proceeds of
land directed

by a previous testator's will to be sold—*Held*, not to be land within the meaning of the Mortmain Act.

A bequest to the president and trustees of a school, to be applied in instructing youth in specified subjects—*Held*, not to fail by reason of the school having been closed before the testator's death or the date of his will.

(a) 19 & 20 Vict. c. 104, s. 1.

1642 174

THE testator, *John Mockett*, by his will, dated the 30th of August, 1854, gave all his freehold and leasehold property of every description, money, securities for money, debts, stock-in-trade, goods, chattels, and other effects, and all contingencies, unto his sister *Johanna*

1860.
 MARSH
 v.
 ATTORNEY-
 GENERAL.
 Statement.

Bayley Mockett, during her natural life, and after her decease, as follows:—"After the decease of my sister, or as soon as every thing can be made the most of and converted into money, and my portion of my aunt's annuity applicable, I give and bequeath the sum of £110 to the trustees and president of the *Deal* Nautical School, in trust, to be invested in public funds, and the yearly interest to be applied for the instruction of youth in the practical part of Navigation and Nautical Astronomy." He also gave the sum of £110 to the curate and chapel wardens of *St. George's*, in *Deal*, to be invested in the funds, and the interest to be distributed in bread to poor widows. And after giving legacies to several persons, if any balance should remain, he gave the same to the trustees of the Infant School of *St. George's* Chapel aforesaid, in trust, for the education of the children of the said school.

The testator died on the 16th of *December*, 1854.

Johanna Bayley Mockett died on the 31st of *October*, 1859.

The testator was, at his decease, entitled in reversion (expectant on the decease of his aunt, *Sarah Bayley*), under the will of *Thomas Bayley*, deceased, to one-fourth share of the proceeds of the sale of a freehold messuage in *Deal*, by the said will devised to the said *Sarah Bayley*, for life, with remainder to trustees, in trust, to sell and hold the proceeds in trust for the several persons in the said will mentioned. The said *Sarah Bayley* being still living, the period of sale had not yet arrived, and no such sale had yet been made. The testator was also entitled in possession to certain freehold and leasehold estates.

The *Deal* Nautical School was discontinued, for want

of funds, on the 19th of April, 1854, several months before the date of the testator's will.

1860.
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Statement.

The Plaintiffs, the trustees of the will, had, on a former occasion, applied by petition [*Re Mockett's Will (a)*] for the advice and direction of the Court, when the petition stood over, in order that a bill might be filed. Among the questions raised by the Petitioner, and in the suit, were the following:—

1. Whether the reversionary interest of the testator, in the proceeds of the sale of the freehold house directed to be sold on the decease of *Sarah Bayley*, was an interest in land, within the Mortmain Act.

2. Whether the legacy to the *Deal Nautical School* had lapsed by reason of the discontinuance of the school.

Mr. *Haddan*, for the Plaintiffs.

Argument.

Mr. *Wickens*, for the Attorney-General.—A share in the proceeds of land directed to be sold is not land within the statute: *Shadbolt v. Thornton (b)*, *Myers v. Perigal (c)*, *Edwards v. Hall (d)*. In *Middleton v. Spicer (e)*, the same rule was applied to copyholds contracted to be sold. The report is not full on this point, but this part of the decree is so stated from the registrar's book in the argument in *Attorney-General v. Harley (f)*. The discontinuance of the school is a mere failure of a trustee; and the bequest does not fail: *Hayter v. Trego (g)*.

Mr. *Surrage*, for persons interested in the residue.—The proceeds of land directed to be sold, are lands

(a) Johns. 628.

(e) 1 B. C. C. 201.

(b) 17 Sim. 49.

(f) 5 Madd. 326.

(c) 2 De G., M., & G. 599.

(g) 5 Russ. 113.

(d) 6 De G., M., & G. 74.

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Argument.

within the statute: *Attorney-General v. Harley* (a), *Alexander v. Brame* (h), reversed in Dom. Proc. nom. *Jeffries v. Alexander* (c).

Mr. Bevir in the same interest.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I am of opinion that the charitable legacies out of the testator's share of the proceeds of the sale of the freehold house are good. The testator was interested together with other persons in this fund. In the case of *Attorney-General v. Harley*, there was one person alone interested, and therefore that person might have elected to take the property as land. In the present case there must be a sale. The question is, whether a share in the proceeds of the sale is an interest in land within the 3rd section of the Mortmain Act. [His Honour read the section.] The words of that enactment are very strong. In the case of *Shadbolt v. Thornton*, where the first testator gave his residuary estate to the second testator, and part of that estate was leasehold, Vice-Chancellor *Shadwell* held, that it was the duty of the administrators of the first testator to convert the leaseholds, and, that, therefore, the second testator took the proceeds as pure personalty. I confess I should rather have been inclined to think, that the duty of the administrators was not, in that case, to convert the leaseholds, but to hand them over as they were. In the case of *Middleton v. Spicer*, the proceeds of the copyholds contracted to be sold by the testator in his lifetime seem not to have been treated as land, though sold under the decree in the suit, but the proceeds were directed to be considered as personal estate; the leaseholds only were held land within the statute. That is the state of the authorities on the precise point in question.

(a) 5 Madd. 321.

(c) 2 Law T., N. S., 748.

(b) 7 De G., M., & G. 525.

It is to be observed, also, that the later cases have been more favourable to charities than those of earlier date. Of this, *Myers v. Perigal* is an example. There can be no doubt, that a partnership interest in a public-house or in a brewery—the case put by Lord *Truro* in his judgment (a), is an interest in land; the material question is, whether it is an interest in land within the Statute of Mortmain. The preamble of the Act points expressly to the disherison of heirs as the mischief to be prevented; but, notwithstanding that, leasehold interests and mortgages, which would not go to the heir, have been settled to be within the statute. In *Myers v. Perigal*, the principle followed appears to have been this:—Where an interest is of such a character as to entitle you, as a means of enforcing your right, to seize the land, as in the case of a turnpike bond, that is an interest in land within the meaning of the statute; but not so where no such right is expressly annexed to the interest. Consequently, where property is given by a first testator upon a trust for sale, which must be executed, as is the case here: there the gift of such proceeds by a second testator is not within the prohibition of the Act. In such a case, the land could not reach the second donor as land. In order to come within the Act, there must be an interest of the donor in land passing, as such, to the charity—so, at least, I understand the recent cases. But, here, the donor could not take any thing as land. He had merely an interest in a share of the proceeds of the sale. I can see no distinction between such a case and that of a share in freehold property held by a Banking Company; which was decided in *Myers v. Perigal* not to be within the statute. The question is, what was the nature of the testator's interest when he made the gift. The decisions as to mortgages and bonds have gone quite far enough. If, however, those decisions

1860.
MARSH
v.
ATTORNEY-
GENERAL.
Judgment.

(a) 2 De G., M., & G. 607.

1860.
 MARSH
 v.
 ATTORNEY-
 GENERAL.
 Judgment.

had been otherwise, there might have been evasions of the Act. But, in a case like the present, there is no such danger. The case, in which the House of Lords has lately reversed the decision of the Lords Justices, was the case of a covenant by the donor, which was held to affect the donor's land, and, therefore, to be virtually a disposition of land. But, here, the testator had no land; the land would be sold, and the proceeds would be handed to him. The present case may be illustrated by the doctrine as to conversion upon trusts for sale. If the trust does not arise, the land would be taken as land; but, if it does arise, the land would be taken as money. It is possible that the case of *Attorney-General v. Harley* may still stand with *Myers v. Perigal*, on the ground, that the testator, in the former case, had a sole interest entitling him to elect to take the land; but, whether that be so or not, I must, consistently with the modern decisions, hold, that the share in the proceeds of the sale of the freehold house was not an interest in land within the statute, and that it passed to the charities. Upon the principle of *Myers v. Perigal*, this must be so.

Upon the question as to the legacy to the *Deal* Nautical School, I think, that this was simply a gift to the treasurer and president of the school, to be applied for the instruction of youth, and not necessarily to be applied in the school. If the school were subsisting, it would be competent to the treasurer and president to send a pupil to *Cambridge*, if they thought he would obtain better teaching there than at *Deal*. This, therefore, is the case of a failure of the trustee, but the trust remains. There must be a scheme for the application of this legacy.

ELLIS v. CORPORATION OF BRIDGNORTH.

THIS was a bill by certain occupiers of houses in *High Street, Bridgnorth*, seeking to restrain the Defendants, the *Corporation of Bridgnorth*, from establishing a new market in place of the old market, which had been held from time immemorial in *High Street*.

The Plaintiffs claimed, that the occupiers of houses in *High Street* had from time immemorial exercised the right of erecting stalls on market-days in front of their houses, either for their own use or for the purpose of letting the same for hire.

In the year 1854 a joint-stock company was formed for the purpose of erecting a new market-place out of *High Street*, and about 100 yards removed from the old Market Hall, which stood in *High Street*. The new market buildings were erected, but the market still continued to be held in *High Street*.

In 1853, the Public Health Act, 1848, 11 & 12 Vict. c. 63, was applied to part of the borough of *Bridgnorth*, as a corporate district under the Act; and, from the 1st of September, 1858, the Local Government Act, 1858, 21 & 22 Vict. c. 98, had been in force within the said district, under which the local board was, the mayor, aldermen, and burgesses, acting by the council.

By the 50th section of the Local Government Act, the local board in a corporate district is empowered, to provide a market-place; to make approaches thereto; to provide all

statute, at a short distance from and in lieu of an ancient market, is an establishment of a market within the 50th section, and not a mere removal.

1861.

Jan. 31st.

Market—
Stallage—
Local Government Act,
1858 (21 & 22
Vict. c. 98).

A corporation, being lords of a market and owners of the soil, is entitled at common law to remove the market; but where the corporation, acting as a local board, takes steps under the statute to set up a market in a new place, it can only act under the powers and subject to the provisos of the statute, and is not entitled to fall back upon its common law right. Whether the immemorial privilege of householders, of erecting and hiring out stalls in front of houses in a market-place, is a right protected by the proviso in the 50th section of the Local Government Act—*Quære*.

Semble, the setting up of a new market, under the

1861.
 ELLIS
 v.
 CORPORATION OF
 BRIDGNORTH
 —
 Statement.

such matters and things as may be necessary for the convenient use of such market; to take stallages, rents, and tolls: with a proviso, that "no market or slaughter-house shall be established in pursuance of this section so as to interfere with any rights, powers, or privileges enjoyed within the district by any person, chartered, joint stock, or incorporated company, without his or their consent," and "for the purpose of enabling any local board to establish markets in manner aforesaid, or to regulate markets already established in any corporate borough before the constitution of a local board," the Markets and Fairs Clauses Act, 1847, 10 & 11 Vict. c. 14, so far as the same related to markets, was incorporated with the Local Government Act, subject to a proviso, that all tolls leviable by the local board, pursuant to this section, should be approved by a Secretary of State.

In the year 1860, a lease was executed by the Market Company of their buildings to the local board, in which the board covenanted, so far as they legally could, to use their best endeavours to prevent the sale of tollable goods elsewhere than in the new market-place, the company covenanting to indemnify the board against any proceedings in consequence thereof.

In December, 1860, the local board gave notice, that, in pursuance of the Markets and Fairs Clauses Act and the Local Government Act, they intended to apply to the Secretary of State for the allowance of bye-laws framed for the regulation of the new market.

The Plaintiffs alleged, that the establishment of the new market would interfere with their rights, and could not be effected without their consent, and prayed for an injunction accordingly.

Evidence was gone into to show, that the corporation were the owners of the soil, and also to prove the im-

memorial practice of the householders, of erecting and taking rent for stalls in *High Street*, and the acknowledgment of the right by the corporation.

The value of a stall appeared to be about £10 a year.

The case came on upon a motion for injunction to restrain the Defendants from establishing or holding a market in the new market buildings, and from taking tolls in respect of stalls therein, and from otherwise interfering with the rights, powers, or privileges of the Plaintiffs as occupiers of houses in *High Street*.

1861.
ELLIS
v.
CORPORATION OF
BRIDGNORTH
Statement.

Mr. *Rolt*, Q.C., and Mr. *Charles Hall*, in support of the motion:—

Argument.

Stallage is a right incident to the market, which may be prescribed: *Corporation of Northampton v. Ward*(a), *Tyson v. Smith*(b), *Elwood v. Bullock*(c).

The question of the ownership of the soil is immaterial. It is not in the Plaintiffs; and the enjoyment of the right of stallage on market-days is sufficient to afford presumption of a grant. Although, according to *Dixon v. Robinson*(d), the corporation may have had a common law right to remove the market, assuming them to be the lords of the soil, they are now proceeding, not under their common law rights but as a local board, and can only act with such consents as the statute requires. The rights of the householders are stallage rights incident to the market, which would be destroyed by the removal of the market; and, therefore, the consent of the householders is necessary to enable the local board to act under the statute.

Mr. *Giffard*, Q.C., and Mr. *Roberts*, for the Defendants:—

(a) 1 Wilson, 107.
(b) 9 Ad. & El. 406.

(c) 6 Q. B. 383.
(d) 3 Mod. 108.

1861.
 ELLIS
 v.
 CORPORATION
 OF
 BRIDGNORTH
 —
Argument.

The corporation, as lords of the soil, may hold the market where they please; and the common law right to remove it is not abrogated by the Local Government Act. We are not establishing, but only removing, a market; and the proviso of the 50th section does not apply. The mere fact of the market having been held in one place from time immemorial is not sufficient to destroy the right of the corporation to remove it: *Dixon v. Robinson*. Then the presumption is, that a market is free; and the Plaintiffs do not prove a right of stallage, for the rent they have been accustomed to take may have been nothing more than payment for the use of their tables.

Again: the right, if it exists, is common to all the householders, and is a custom; and this bill is not framed on that footing. At the most, there is a mere right to damages; and the right is too trifling to be the subject of a bill in equity. The 19th section of the Markets Act, moreover, gives a special power of applying to justices for compensation; and this ought to be pursued.

[They also referred to the 114th section of the Public Health Act, 1848.]

Mr. *Rolt*, in reply:—

What the corporation are doing is establishing a market, and not mere removal. If it is only removal, they are acting as a local board, and, as such, cannot fall back on the common law power of removal inherent in the corporation. If the Local Government Act entitles them to remove a market, it does so only under the clause which contains the proviso requiring the consent of all persons whose rights are interfered with.

Then stallage is a right incident to the market; and the Plaintiffs are damnified by the establishment of the new market.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

There are questions of fact involved in the case, which must be determined, before it can be ascertained how far the rights of the Plaintiffs will be interfered with by the establishment of the new market; and I think the proper course will be, to let the question go to a court of law.

1861.
ELLIS
v.
CORPORATION OF
BRIDGNORTH
Judgment.

The corporation seem, on some occasions, to have admitted, that the householders enjoyed a peculiar immemorial right of setting up and hiring out stalls, in front of their houses, in the market which was immemorially held in *High Street*; and it is in evidence, that the privilege to each householder was of the value of about £10 a year—a sufficiently solid and valuable right to entitle the Plaintiffs to the protection of this Court. The corporation say, that they are lords of the market and owners of the soil, and, as such, entitled to remove the market as they please. But, if they are owners of the soil, the prescriptive right is conclusively established against them, because they have immemorially suffered the occupiers to take stallage rent, which the corporation would have been entitled to receive. The substantial answer to this contention is, that the corporation have not been acting as owners of the franchise, or purporting to exercise their common law right of removing the market, but have proceeded as a local board under the powers of the modern statutes. It is true, the corporation and the local board are in one sense the same body, but it is only the corporation, acting by the council, which constitutes the local board; and the powers of the board and the corporation are essentially distinct. The corporation, in fact, have been exercising, as a local board, powers which, as a corporation, they did not possess. Having chosen to avail themselves of the powers conferred by the Local Government Act for special purposes, which far exceed any that they had as owners, they must be regarded as acting simply as a local board, and cannot fall

1881.
 ELLIS
 v.
 CORPORATION OF
 BRIDGNORTH
 Judgment.

back on their common law rights as corporate owners of the soil.

In the Local Government Act there are powers to provide markets, but these are subject to the proviso, that no rights of any persons are to be interfered with, without their consent. It was argued, that this was a case, not of the establishment but of the removal of a market; but I do not think this is borne out by the facts. The corporation purpose, not only to remove the market out of *High Street*, but to establish a market, under the statute, quite distinct from the old common law market. It would be, in the strictest sense, establishing a new market. The terms of the notice given by them are themselves sufficient to show this; and the corporation must be held bound by all the provisions of the statute, under which their proceedings have been taken.

The questions to be tried at law will be, whether the Plaintiffs have the right of stallage which they claim; and, if so, whether that legal right, if it exists, would be interfered with by the establishment of the new market, so as to render their consent necessary under the 50th section of the Act. It is a mixed question of law and fact;—of law, whether the right is one within the proviso; and of fact, whether that right will be interfered with by the use of the new market-place. However strong an impression may be felt, it is clearly a question of fact, not to be taken for granted, whether the introduction of traffic in the new market-place will be an interference with the privileges of the Plaintiffs on the old site. If the Defendants should proceed to clear away the stalls in the *High Street*, the interference would be too clear to render an appeal to a jury necessary; but the notice given by the corporation is carefully framed, so as to leave it open to them to take such steps as they may afterwards think

proper in this respect, and to avoid an admission of an intention to remove the stalls. I cannot but see the possibility, that the Plaintiffs may, by the loss of custom, suffer an injury which may be too remote to be the subject of damages; but the contest is one in which it is impossible for the Court to act, until the questions of fact have been tested by the opinion of a jury. All I can do at present is, to give the Plaintiffs liberty to take such steps as they may be advised to establish their right at law.

1861.
ELLIS
v.
CORPORATION OF
BRIDGNORTH
Judgment.

MARSHALL v. PEASCOD.

BY the settlement on the marriage of *Francis Priestman*, dated the 1st of October, 1828, real property was conveyed to the use of *R. Peascod* in fee, in trust for the husband and wife successively for life, and, after their decease, over to the children; and, in default of such issue, "in trust for all and every the nephews and nieces of the said *Francis Priestman*, children of his brother and sisters then living, and of the several and respective heirs of all and every such nephews and nieces of the said *F. Priestman*, then dead, having left lawful issue, living at the time of the failure of issue of the said *F. Priestman* by his intended wife, share and share alike, as tenants in common, and not as joint tenants."

Feb. 25th &
26th.

Settlement—
Construction
—Heirs.

Under a limitation of real estate in a marriage settlement, after the decease and failure of issue of husband and wife, "in trust for nephews and nieces then living, and the several and respective heirs of nephews and nieces then dead, having left lawful issue, living at the time of the failure of issue of the marriage, as tenants in common."—*Held*, that nephews and nieces took life estates,

By his will, dated the 26th of November, 1850, the said *F. Priestman* confirmed the settlement, and gave certain specified estates and his residuary real estate to his wife in

and that the eldest son of a nephew deceased at the time of such failure of issue took in fee.

1861.
MARSHALL
v.
PRASCO.
Statement.

fee, upon trust, to pay certain annuities to various nephews and nieces by name, with survivorship, and to retain an annuity for herself; and, subject to the said annuities, the testator devised the said estates to the same nephews and nieces, together with other nephews and nieces, by name, as tenants in common in fee.

The testator made a codicil, dated the 22nd of September, 1852, as follows:—"I, *F. Priestman*, finding that I have omitted in the above will the names of my two nephews, *Priestman Moses* and *Francis Moses* (now dead)¹ it is my wish, that they and their children shall enjoy the same rights and privileges, as brothers and their children, which are mentioned in the said above will."

Francis Priestman died in 1854, and his wife in 1859, having had no issue.

Francis Moses and *Ann Cradock* were the only nephews or nieces dead at the time of the testator's death or that of his widow, and both of them left children, still surviving.

The bill was filed by *Ann Marshall*, one of the nieces named in the residuary devise, and her husband.

Argument.

Mr. *Giffard*, Q.C. and Mr. *F. P. Morris*, for the Plaintiffs.—The intent of the settlement clearly was, that the heir of a deceased nephew or niece should stand in his or her place; and all must take life estates.

Mr. *Hobhouse*, for the children of *Francis Moses* and *Ann Cradock*.—The gifts to nephews and nieces only pass life estates. A gift to the heir of *A.* passes the fee, even when the singular is used; therefore, the gift to the heirs of nephews is in fee. The condition as to leaving

issue does not cut it down, but is a mere condition which is satisfied.

Mr. *Bury*, for other nephews and nieces.

Mr. *Baggallay*, Q.C., and Mr. *Bevir*, for other parties.

1861.
MARSHALL
v.
FRASCO.
—
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Feb. 26th.
—
Judgment.

The question in this case is a short one, on the construction of a very singular settlement. The gift to the nephews and nieces, by itself, would pass nothing more than life estates; but the subsequent provision for the heirs of deceased nephews and nieces introduces the rule of law, by which a limitation to the heirs of any person is held to pass the fee simple. The rule does not even seem to require the use of the plural "heirs," though Lord *Coke's* reasoning, (a), points to that; but later authorities appear to have settled, that the same consequence follows where the word "heir" is used in the singular. The phrase "respective heirs" might, perhaps, be read so as to restrict it to the heir of each nephew or niece in the singular; though I doubt, whether the true reading would not be to regard it as a gift to the heirs of each in the plural. In any view, however, the words are so far sufficient to pass the fee.

Then comes the question, whether the subsequent words, "having left lawful issue," &c., make any difference; but there is nothing in those words to cut down the fee previously given. It is a fee simple, on condition that the deceased nephew or niece shall have left issue surviving the settlor and his wife. There is nothing irrational in

(a) Co. Litt. 8. b.

1861.
MARSHALL
v.
PEASCOD.
—
Judgment.

such a limitation, except from the contrast between the gifts to nephews and those to their heirs; but it is impossible to say in which clause the mistake, if any, was made. I am bound to follow the strict words of the settlement; and I must, therefore, hold, that the surviving nephews and nieces took life estates, and that the heir-at-law of each deceased nephew or niece who left issue surviving the settlor and his wife took in fee.

March 17th &
27th.

Charge secured
by a Term—
Annuity by
Way of Rent-
charge—Sale.

HALL v. HURT.

Where, by a testamentary appointment under a power in a settlement, a charge was created and a term vested in trustees to raise the same by sale thereof—*Seemle*, that the money could not be raised by a sale of the fee, though the term was insufficient for the purpose. But, a life annuity being granted in the same settlement by way of rent-charge, and it appearing that arrears which had accrued could not be otherwise satisfied, a decree was made for sale of the fee.

BY the settlement, made on the marriage of *J. H. Hall* the younger and the Plaintiff, and dated the 15th of September, 1841, certain reversionary freehold estates were conveyed, subject to a life estate in *J. H. Hall* the elder, and to prior charges, to the use of trustees for a term of 3000 years, and, subject thereto, to the use of *J. H. Hall* the younger for life, with remainder to the use and intent that the Plaintiff should, after the decease of *J. H. Hall* the elder and *J. H. Hall* the younger, receive during her life a clear yearly rent-charge of £300, with powers of distress and entry, and, subject thereto, to the use of the children of the marriage; and the said settlement contained a power for the said *J. H. Hall* the younger, by deed or will, to charge the said estates with £5000, and to limit the same to any person or persons, for any term of years, in trust, to raise the sum so charged by the usual ways and means and by way of mortgage, yet so that no sum so charged should be raisable during the life of *J. H. Hall* the elder, or should have priority to the then subsisting charges.

The said *J. H. Hall* the younger, by his will, dated the 5th of April, 1843, in exercise of the said power, "charged the said estates with the sum of £5000, and limited and devised the same to trustees for a term of 500 years from the decease of *J. H. Hall* the elder," and declared, that the said trustees should stand possessed of the said sum of £5000 and the said term of 500 years, upon trust, by sale or mortgage thereof, or by such other ways or means as they should think fit, to raise and pay his debts, and to pay his wife the sum of £2000, and, subject thereto, upon the trusts declared of his residuary real and personal estate.

1861.
HALL
v.
HURT.
Statement.

The said *J. H. Hall* the younger died on the 30th of October, 1845, leaving the Plaintiff his widow, and one child (an infant Defendant) him surviving.

The said *J. H. Hall* the elder died on the 2nd of April, 1859.

The Plaintiff's annuity was in arrear to the extent of £225, and the income of the estate was insufficient to keep down the interest on prior charges and the amount of the annuity.

It appeared, that, by a sale of the fee, a sufficient sum might be raised to pay off all the prior charges, but that a sale of the term would probably not produce sufficient for that purpose.

The bill prayed a declaration, that the arrears of the annuity and the £5000 were effectually charged on the fee simple, and that the same might be sold.

Mr. *Giffard*, Q.C., and Mr. *Browne*, for the Plaintiff:—

Argument.

The £5000 is primarily a charge on the fee; and the

1861.

HALL

v.

HURT.

Argument.

term is only a collateral security, giving power to raise the sum without the aid of the Court; but this does not take away the jurisdiction to sell the estate to effectuate the charge.

Then the fee may be sold to pay the arrears of the annuity: *Cupit v. Jackson*(a), *Graves v. Hicks*(b), *White v. James*(c), *Wrigley v. Sykes*(d), *Coze v. Basset*(e), *Shaw v. Borrer*(f), *Re Bardin's Will*(g).

Mr. Rolt, Q.C., and Mr. Foster, for the Defendants.—The term is clearly the only security for the £5000. The authorities relied on for selling to cover arrears of an annuity have been questioned and cannot safely be followed.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case involves a very short point. I think it turns entirely on the question, whether a sale can be directed for the arrears of the annuity; for I do not feel, that I can safely rest it upon the construction contended for, in argument, of the words creating the charge of £5000. Looking at the whole contents and scope of the will, my impression is, that the freehold was not intended to be sold to raise the charge of £5000, but that the term was created for that purpose, with the view of avoiding a sale of the fee.

The point, as to the arrears of the annuity, was dis-

(a) M'Clell. 495.

(b) 11 Sim. 536, 551.

(c) 26 Beav. 191.

(d) 21 Beav. 337.

(e) 3 Ves. 155.

(f) 1 Keen, 559.

(g) 5 Jur., N. S., 1379.

cussed in *Cupit v. Jackson* and *Graves v. Hicks*, which are somewhat conflicting; but, even in the latter case, I do not find, that the Vice-Chancellor absolutely denies the right to a sale in any case. He intimates a very strong opinion, that the Court ought not to make such a decree except in a case of necessity; but he does not seem to question the proposition, that, where an estate is limited to the use that a certain person shall receive an annuity, the Court has authority to say, that he shall receive it in the most beneficial way, namely, by means of a sale, if necessary, to raise the arrears. In *White v. James(a)*, the Master of the Rolls rested his judgment a good deal on the circumstance, that the annuity there was a fee farm rent, which must last for ever. But I think, that, looking at the principle on which the Vice-Chancellor acted in *Graves v. Hicks*, the present case is one in which there can be no difficulty about ordering a sale. A sale is the only mode in which the property can be made available; and, having regard to *Cupit v. Jackson* and to the decision of the Master of the Rolls, I think the facts of this case are abundantly sufficient to justify me in ordering a sale to raise the arrears of this annuity.

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Judgment.

DECLARE the arrears of the annuity a charge on the fee simple, subject to prior charges. ORDER, a sale of the fee simple, and inquiries as to priority.

Minute of
Decree.

(a) 26 Beav. 194.

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May 31st;
June 1st, 3rd,
4th, 5th, &
11th.

366095

1827, 528, 8 ch. 847, 947.

HARE v. LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Railway Com-
pany—Agree-
ment—*Ultra*
Vires—Ac-
quiescence.

Two groups of railway companies, being respectively the owners of independent, conterminous routes, agreed to divide the profits of the whole traffic in certain fixed proportions, calculated on the experience of the past course of traffic:—*Held*, that such an agreement, being *bonâ fide*, was not *ultra vires*.

Whether a Plaintiff, who, as shareholder in one company, has, with full knowledge, received profits under an agreement between that company and others, can afterwards, on purchasing shares in one of the other companies, parties to the agreement, sustain a bill, on behalf of all shareholders in such company, impeaching the agreement as *ultra vires*; more especially, if it appear that he is really suing in collusion with one of the companies, parties to the agreement—*Quære*.

THE Plaintiff was a shareholder in the *London and North-Western Railway Company*, which was incorporated by an Amalgamation Act in the year 1847, "for the purpose of working, completing, and maintaining" certain specified lines, thenceforth to be called the *London and North-Western Railway*. The 32nd section of the special Act enacted, that (except as therein was otherwise provided for) the profits of the company should be divided among the several proprietors of stock and shares of and in the capital of such company, rateably, according to the nominal amount of such stock and shares. The Lands Clauses, Companies Clauses, and Railways Clauses Consolidation Acts were incorporated.

In the year 1856, an agreement was entered into between the said Defendants, the *London and North-Western Railway Company*, the *Lancaster and Carlisle Railway Company*, the *Caledonian Railway Company*, the *Great Northern Railway Company*, the *North-Eastern Railway Company*, the *North British Railway Company*, and the *Midland Railway Company*, reciting, that the three first-named companies were together the owners of the main line of railway from *London to Edinburgh*, viâ *Rugby and Preston to Carlisle*, and thence by the *Caledonian Railway*, ordinarily known as "The West Coast Route;" and that the other companies, except the *Midland*, were together the owners of another main line of railway from *London to Edinburgh*, viâ *Knottingley*

impeaching the agreement as *ultra vires*; more especially, if it appear that he is really suing in collusion with one of the companies, parties to the agreement—*Quære*.

and *York*, and were, together with the *Midland*, the owners of another main line of railway from *London* to *Edinburgh*, viâ *Normanton* and *York*, which two last-mentioned main routes between *London* and *Edinburgh* were known as “The East Coast Route.” And reciting, that, by means of the *Caledonian* Railway and the railways of the *Edinburgh* and *Glasgow*, and *Scottish Central*, and other railway companies, access by railway was obtained by both the said routes between *London* and *Glasgow*, and to *Greenhill* Junction, *Larbert* Junction, and other places in the north of *Scotland*; and that the said several companies, parties thereto, were also owners of or otherwise interested in numerous branch lines of railway connected with their respective portions of the said two main routes, and had thereby obtained access by railway to various towns and places in the districts through which such railways and branches respectively passed. And that the said several railway companies carried on business as common carriers, by their said several railways and branch railways, and by the other lines of railway in conjunction therewith respectively, between *London* and *Edinburgh*, and the various towns and places to which they had obtained access.

And reciting, that, by “The Railways Clauses Consolidation Act, 1845,” and by other Acts of Parliament relating to some of the said companies, parties thereto, the said companies were empowered to contract with each other for the passage over their respective lines of railway of carriages and waggons belonging to them respectively, upon the payment of such tolls and under such conditions and restrictions as might be mutually agreed upon, and for the division and apportionment of the tolls, rates, and charges taken upon their respective railways, and to make and enter into such other contracts and agreements as they might deem advisable, so as to avoid the necessity

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of a change of carriages and other delays arising from a diversity of interests.

And reciting, that it would be of importance to all the said several railway companies, parties thereto, and would tend much to the accommodation of the public, both as regards regularity and despatch in the transmission of passengers and the carriage and delivery of goods, and be in other respects beneficial to all parties, that arrangements should be made between the said several companies, parties thereto, respecting the carriage of such traffic, with a view to insure the regular working and management thereof between *London* and *Edinburgh*, and *London* and *Glasgow*, and other places between *Edinburgh* and *Glasgow*, and in the north of *Scotland*, by both the said routes, and also to and from intermediate places common to the said companies owning the said routes: it was thereby mutually agreed by and between the said several companies (among other things), as follows:—

“2. That this agreement shall include all traffic of whatever description carried by either of the said routes from or to the several places mentioned in the schedule (except certain excepted articles); and such traffic shall, for the purposes of this agreement, be considered as divided into two classes, viz. ‘Passenger traffic’ and ‘Goods traffic.’

“3. That all the through traffic from or to any of the towns or places in *England* mentioned or referred to in the column numbered 1 in the said schedule or tabular statement of proportions of traffic and receipts to or from *Edinburgh*, or to or from *Glasgow*, or to or from places in the north of *Scotland*, shall, so far as may be necessary for the objects and purposes of this agreement,

and consistent with a due regard to the interests and convenience of the public and of the consignees or consignors thereof, be carried and sent by the said companies, parties hereto respectively, along and over the said two routes and the alternative portions thereof, as near as may be, in the several and respective proportions and quantities mentioned and stated in such schedule or tabular statement, regard being had and effect being given by the said companies, parties hereto respectively, to the notes, rules, and directions in or appended to such schedule or tabular statement, as respects the carriage of passengers or goods or the amount of tonnage to be sent or carried by or between certain particular alternative or intermediate routes or portions of routes to and from different specified places or localities, in reference to those particular portions of such traffic to which such notes, rules, and directions apply or have reference.

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" 4. That, except and subject as hereinafter otherwise provided, the gross revenues (which expression is meant to include the rates, tolls, and charges derived from such through traffic, whether carried by the said two routes in the proportions specified in the last preceding clause or not) shall be periodically divided and apportioned by and through the railway clearing house between the companies, parties hereto, whose lines of railway form the said two routes, and the alternative portions thereof, in the several and respective proportions or shares mentioned and stated in the said schedule or tabular statement, but, nevertheless, subject to the notes, rules, and directions mentioned in or appended to such schedule or tabular statement, as respects such revenues, or the subdivision between certain particular alternative or intermediate routes or portions of routes to different places, of those particular portions of such gross revenues to which such notes, rules, and directions apply or have reference, and effect being in all

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cases given to such notes, rules, and directions when the same apply.

“ 5. That, if at any time, and so often as it shall appear upon the periodical divisions of the said gross revenues, that more than the several and respective proportions or quantities of traffic specified or referred to in Article 3 of these presents shall have been carried by either of the said two main routes, or by either of the alternative portions of the East Coast route between *London* and *York*, or by any of the other alternative or intermediate routes or portions of routes referred to in the said Article 3, then and in every such case, before any division and apportionment of such gross revenues under the last preceding clause between the companies, parties hereto, whose lines of railway form the West Coast route and those whose lines form the East Coast route, or between any of the same companies whose lines form the said alternative routes on the East Coast, between *London* and *York*, or between any of the said other alternative or intermediate places or districts mentioned or referred to in the said Article 3, there shall be first deducted out of the said gross revenues, or, as the case may be, out of the share or proportion thereof belonging to the alternative or intermediate routes upon which such excess arises, as and for the working expenses of or incident to the carriage of such excess, twenty per cent. of the gross revenues from any such excess in respect of passenger traffic, and thirty per cent. of the gross revenues from any such excess in respect of goods traffic, or other the per-centage which may be fixed as hereinafter provided; and the amount of the per-centage so deducted shall be paid to or retained by the sole company, or apportioned among the several companies parties hereto (as the case may be), upon whose line or lines such excess shall have been carried: such several companies, in case there

de several entitled thereto, dividing their shares thereof amongst themselves in the same proportions as their proportion of the gross revenues from such excess traffic are directed to be divided between them. Provided always, that, inasmuch as it has not yet been satisfactorily ascertained that the aforesaid allowances for working expenses in respect of excess traffic fairly represent the actual working expenses of the different descriptions of traffic which will be carried under these presents, it is understood and agreed between the said parties hereto, that such allowances shall be subject to future revision and alteration at the end of every or any year during the term for which this agreement is made, in case any of the said parties hereto shall hereafter feel dissatisfied with such allowances or either of them, and require the amount or rate of allowance for the future to be reconsidered, and, if not agreed upon, shall be settled by arbitration, in manner hereinafter provided.

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" 6. That, as between the companies, parties hereto, whose lines form the West Coast route, and as between those whose lines form the East Coast route, and as between the companies, parties hereto, whose lines form either of the said alternative routes on the East Coast between *London* and *York*, or those whose lines form, either alone or together with the railway of any other company or companies, any of the different alternative or intermediate routes hereinbefore referred to, their respective shares of the aforesaid gross revenues shall (except when otherwise specially provided and directed) be subdivided and apportioned between them respectively rateably, according to the mileage distance, for the time being recognised and acted upon in the railway clearing house, of each such company's railway between the extreme points on each such respective routes between which the traffic or the share of traffic producing such revenues shall

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or ought, according to the provisions of this agreement, to have been carried the shortest route by the lines forming any of such respective routes on the West Coast or on the East Coast, as the case may be, being in all cases taken and considered as fixing the mileage length of the distance between the two common points on any such respective routes, by or according to which the mileage division for the entire distance between the extreme points on any such route shall be made between the companies owning such entire distance."

" 15. In all cases, and by whatever route the traffic to which this agreement applies shall be carried, the gross rates, fares, and charges from point to point for the different classes or descriptions of traffic shall be the same, unless otherwise agreed between all of the said parties hereto who are interested therein, and shall be fixed and determined by the common consent of not less than five of the said companies, parties hereto (except where a less number of such companies are alone interested therein, and then by a majority of such interested companies), two at least of the companies owning the terminal stations or extreme points on any of the lines of the said companies, parties hereto, of departure and arrival of any such traffic by either of such routes, being always two of such five or lesser number of companies; and such rates, fares, and charges shall be strictly adhered to until, and then only as, the same shall with such consent be from time to time altered or modified. Provided always, that any of the said companies, parties hereto, may, from time to time, on any particular special occasion, and in order to secure special traffic for such occasion, make any special rate, charge, or arrangement (but not so as to extend beyond the period of the next meeting of the committee of managers hereinafter provided for), for or as to such traffic; but, in every such case, the same shall be forthwith made known to the other compa-

nies, parties hereto, in order that general rates may, if deemed expedient, be adopted to meet the exigency which shall have so arisen ; and, in case the said other companies, parties hereto, shall decline to make such general rate, the company by whom such special rate was made shall not thereafter make any such rate again, or accept any such special traffic at special rates, of which such other companies shall have expressed their disapproval, either specially or generally, without first obtaining the consent of the said other companies thereto ; it being the intent of the said parties hereto, that the expression of such disapproval in reference to any such matter shall prevent and be a prohibition against the repetition of the act or conduct disapproved of, or of the like thereof.

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“ 16. That, until it may be found necessary or expedient to alter the arrangement by this clause provided for, the managers of each of the said companies, parties hereto, shall, from time to time, meet and confer together as a committee, in order to arrange and decide, in case they can agree, upon all matters from time to time arising out of or in any way connected with the objects and purposes of this agreement.”

And, after making provision for the admission of the *Edinburgh and Glasgow* Railway Company, as part owners of the said East Coast route, and of the *Scottish Central* Railway Company, and the *Edinburgh, Dundee, and Perth* Railway Company, to participate in the provisions of the said agreement, the said agreement proceeds as follows :—

“ 20. Each of the said companies, parties hereto, shall and will, during the subsistence of this agreement, so far as they reasonably can or may, encourage and promote, in accordance with the terms and provisions of this agreement, the expeditious passage and continuous transmission of the

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several descriptions of traffic to which this agreement relates to and from the respective districts to or for which such traffic may be destined or be desired to be taken or sent, and shall and will, in all respects, carry on and conduct such traffic faithfully the one towards the other and according to the true spirit and intent of this agreement, and shall not nor will, either by booking short of the place of ultimate destination and then rebooking, or by secret or other allowances or drawbacks, or by quoting or charging lower rates from or to intermediate or neighbouring or other stations, or by granting tickets without money, or free passes, or an extension of credit beyond what is agreed upon between the said parties hereto or the said committee of managers, or usual, or by any other means or inducement whatsoever, cause or promote the said traffic to go or be sent, travel or pass, to its place of destination, so that the same, or the revenues derived therefrom, shall not appear and be treated as part of the traffic and revenues to which this agreement relates, so as to prevent such traffic from being carried on or the revenues therefrom divided and apportioned in accordance with the bonâ fide intent and meaning of the terms of these presents, or so as to cause the same to be divided and apportioned differently than would have been the case in case such traffic had been sent and booked or forwarded through directly from its place of despatch to its place of ultimate destination, in conformity with the terms and spirit of this agreement.

“ 22. This agreement shall commence and take effect as on and from the 1st day of January, 1856, and shall continue in force for the full term or period of fourteen years from such day; and, unless, six months at least before the expiration of the said term, one or more of the said companies shall have signified, by notice in writing, under the hand or hands respectively of its or their secretary or secretaries respectively, and delivered to each of the other com-

panies, an intention to determine this agreement at the expiration of the said term of fourteen years, this agreement shall continue in force after the expiration of that term, until determined by notice as aforesaid, given at least six months before such determination is to take effect; and no contract, agreement, or arrangement respecting the management, carrying on, or division of the traffic to which this agreement relates, or of any traffic arising within the districts affected by this agreement, or to which it may be extended, to take effect at or after the expiration or determination of this agreement, shall be entered into, nor any treaty or negotiation for any such contract, agreement, or arrangement, entertained, by any of the said companies, parties hereto, at all during the said term of fourteen years, without the consent of all the said other companies, parties hereto, nor afterwards, during the continuance of this agreement, without the same and the terms thereof being first communicated to all the said companies, parties hereto, and to such one or more of the *Edinburgh* and *Glasgow*, and *Scottish Central*, and *Edinburgh, Dundee*, and *Perth Railway Companies*, as shall have executed such supplemental agreement as aforesaid, and a reasonable time and opportunity allowed to all the said companies, parties hereto, and to the said other above-named companies, to meet and confer, and, if possible, arrange the terms of any future general arrangement with reference thereto."

The schedule to the agreement contained, in the first column, the names of a large number of principal stations, with corresponding entries in the other columns, the nature of which appears from the following specimens:—

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 {
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THE SCHEDULE or Tabular Statement of Proportions of Traffic and Receipts referred to in the foregoing Agreement, showing the proportions and manner in which the same are agreed to be divided or apportioned, except where otherwise provided.

COLUMN 1. Traffic from or to the undermen- tioned towns or places in Eng- land, to or from the respective places named or referred to in columns 2, 3, or 4.	COLUMN 2. From or to <i>Edinburgh</i> , including all places lying East of <i>Falkirk</i> to or from the respective places named or referred to in column 1.				COLUMN 3. From or to places in the North of Scot- land, including <i>Falkirk</i> and <i>Green- hill</i> Junction, to or from the respec- tive places named or referred to in column 1.				COLUMN 4. From or to <i>Glasgow</i> , including all places lying west of <i>Greenhill</i> Junc- tion, to or from the respective places named or referred to in column 1.			
	West Coast Route.		East Coast Route.		West Coast Route.		East Coast Route.		West Coast Route.		East Coast Route.	
	Passengers.		Goods.		Passengers.		Goods.		Passengers.		Goods.	
	per cent.	per cent.	per cent.	per cent.	per cent.	per cent.	per cent.	per cent.	per cent.	per cent.	per cent.	per cent.
<i>London</i>	40	50	60	50	50	50	50	50	80	60	20	40
<i>Liverpool</i>	all	all	nil	nil	all	all	all	nil	all	all	nil	nil
<i>Leeds</i>	33½	50	66½	50	50	50	50	50	66½	60	33½	40

CASES IN CHANCERY.

The main lines of the said West Coast route and East Coast route respectively were, throughout the whole of their respective lengths, separate and distinct, although collateral routes.

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On the settlement of accounts for the half-year ending Christmas, 1857, between the *London and North-Western* Railway Company, the *Lancaster and Carlisle* Railway Company, and the *Caledonian* Railway Company, as owners of the West Coast route, on the one hand, and the *Great Northern* Railway Company, the *North-Eastern* Railway Company, the *North British* Railway Company, and the *Midland* Railway Company, as owners of the East Coast route, on the other hand, in pursuance of the provisions of the said agreement, the Defendants, the *London and North-Western* Railway Company, the *Lancaster and Carlisle* Railway Company, and the *Caledonian* Railway Company, as the owners of the West Coast route, paid over to the *Great Northern* Railway Company, the *North-Eastern* Railway Company, the *North British* Railway Company, and the *Midland* Railway, as the owners of the East Coast route, the balance of 7,329*l.* 14*s.* 5*d.*, in respect of the through traffic between *London* and *Glasgow* alone for the preceding half-year—the through traffic, in respect of which such sum of 7,329*l.* 14*s.* 5*d.* had been received, having been carried and conveyed exclusively on the said West Coast route.

Of this sum the proportion paid by or on account of the said Defendants the *London and North-Western* Railway Company was £3858, or thereabouts, the whole of which was taken and paid out of the revenues, tolls, and profits of such last-mentioned company, earned upon their own undertaking, in respect of the earnings of such undertaking as a portion of the said West Coast route.

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By a supplemental agreement, dated the 13th day of January, 1859, and made between the Defendants the *Edinburgh and Glasgow* Railway Company, of the first part, and the several other companies, Defendants hereto, of the second part, the *Edinburgh and Glasgow* Railway Company was admitted as a party to the said agreement.

The bill alleged, that the several companies were acting on the said agreement, and prayed, that it might be declared beyond the powers of the several companies and to be illegal and void, and for an injunction to restrain the several companies from acting under it, and from mixing up or blending the revenues, tolls, profits, or moneys of the *London and North-Western* Company with those of the other companies, so as to form a common fund, or for any other purpose, and from dividing the revenues, tolls, profits, or moneys of the *London and North-Western* Company, or any portion thereof, between that and the other companies, and from paying or allowing in account to the other companies, or in any manner alienating any of their revenues, tolls, profits, or moneys, under colour of the said agreement, and also for an account of past transactions under the agreement.

It appeared from the evidence, that the agreement in question had been preceded by a previous agreement of the same character; that the Plaintiff had for many years been a shareholder and had received in one of the Defendant companies without having raised any objection to the arrangement; and that he purchased shares in the *London and North-Western* Railway for the purpose of instituting this suit. There was also evidence tending to show, that he sued in the interests of, if not in collusion with, one of the companies parties to the agreement.

Sir H. Cairns, Q.C., and Mr. Bovill, for the Plaintiff:—

It is impossible to read the agreement without seeing that it constitutes a quasi-partnership, and is not a mere arrangement for through traffic, such as is authorized by the 87th section of the Railways Clauses Act. The two routes touch only at their extremities; and there is nothing in the nature of through traffic in the subject. Through traffic means only traffic carried along a series of lines in continuation of one another. It follows, therefore, that the agreement is *ultra vires* and illegal. A case of acquiescence is set up against the Plaintiff, but, even if proved, it would not bind a shareholder further than to prevent him from calling for an account of past acts and payments. It cannot make an illegal agreement binding for the future.

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Mr. Rolt, Q.C., and Mr. Speed, for the *London and North-Western Company*:—

There is nothing *ultra vires* in the agreement. Railway companies are carriers, and are at liberty to conduct their business as other carriers may, except so far as they are subjected to express prohibition by the Legislature. There is nothing in any of the Acts to say, that a railway company may not make such arrangements as they consider most advantageous to enable them to make profits in their own proper business as carriers; and this is all that has been done. It is true, that the company is bound to divide its profits among the shareholders, but then it may realise and ascertain those profits in the best way it can; and there is nothing to prevent it from ascertaining its share of certain profits, made by its own and other lines, from the results of past experience, and binding itself to an arrangement on that footing.

[The VICE-CHANCELLOR.—Can a company bind its shareholders to a conjectural estimate of profits?]

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We submit, that that is within the powers of management, which companies necessarily must have: *Shrewsbury and Birmingham Railway Company v. London and North-Western Railway Company (a)*, *South Yorkshire Railway and River Dun Company v. Great Northern Railway Company (b)*, *Simpson v. Denison (c)*.

There is nothing in this case like a contrivance to evade the limitations of the company's Act. The assumption on the other side is, that there is no act of management, however minute, for which a company is competent, unless it can find a specific authority in its Act of Parliament. If this were so, it would be impossible for a company to carry on business at all; and the true principle is, that a company may conduct its business as it pleases, subject only to any prohibition imposed by the Legislature. The onus is not on us to show the authority to do anything which is conducive to the successful conduct of the company's business, for this is implied in the authority to conduct a carrying business at all. The onus is on the Plaintiff to point out a prohibition of the acts he complains of. This is the fair result of the authorities. In *Simpson v. Denison*, the agreement was not a bona fide agreement for the purpose of conducting the traffic belonging to the *Great Northern* Company, but it was an agreement designed, under colour of passing over another line of railway, to acquire for the *Great Northern* the whole of the traffic of that other line. This was the ground of the decision—the same principle, in fact, on which the *South Yorkshire and River Dun* case was decided; and it is in the presence or absence of such bona fides that the guiding principle is to be found.

(a) 7 Railw. Cas. 531; *S. C.*
 2 M. & G. 324; 17 Q. B. 852;
 6 H. L. Cas. 113.

(b) 7 Railw. Cas. 744, 771;
S. C. 9 Exch. 55.

(c) 7 Railw. Cas. 403; *S. C.*
 10 Hare, 51.

The only other case which comes near this is the *Shrewsbury case*. That was an agreement for the division, in certain fixed proportions, of the tolls taken by the Plaintiffs' and the Defendants' companies from parts of their respective lines, including a portion which was common to both; and it prohibited the Defendants from using certain branch lines to compete for traffic properly belonging to the Plaintiffs. A bill was filed for specific performance. A demurrer was allowed by the Vice-Chancellor of *England*, on the ground, that, according to the terms of the agreement, the time had not arrived for it to come into operation. This decision was reversed by Lord *Cottenham*, who held, that the time had arrived, and also held, that there was no illegality in the agreement. Lord *Cottenham*, after stating that it was the duty of the managers of the Plaintiffs' company to secure, by all lawful means, the most traffic they could get, and that they were apprehensive of a loss of traffic by the competition of the Defendants, says of the agreement, "At all events, if it was a means by which, according to their opinion, the greatest security was preserved to their subscribers of getting a fair and reasonable share of the traffic, how can it be a violation of duty? It is merely a different mode by which that object is secured and maintained." And, after stating the arrangement for a division of the profits in certain proportions, he says, "That was a beneficial arrangement for their own subscribers; their subscribers cannot complain, the duty of the directors being to obtain the most they could:" and Lord *Cottenham*, holding also that the other part of the agreement which prohibited competition over a certain circuitous route was not illegal, overruled the demurrer.

This is a distinct authority in our favour. Then, an injunction having been granted by the Vice-Chancellor of *England*, the order was discharged by Lord *Truro*, with liberty to the Plaintiffs to proceed at law, simply on the

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ground, that the legal right ought first to be established. The case was then heard before the Queen's Bench; and, upon demurrer, the agreement was held not to be void. Lord *Campbell*, in delivering judgment, disposed of the two objections: one, that the agreement was a fraud on the public; the other, that it was a fraud on the shareholders. As to the first, he said, that an agreement to prevent competition, restricted to one particular line, was no more illegal than for two persons engaged in trade to agree, that one should not exercise his trade or compete with the other within a particular district.

And, with respect to the injury to the shareholders by the stipulation for a division of profits, he said, "If such a stipulation were necessarily injurious to the shareholders, the objection might be valid; but this stipulation may be greatly for the benefit of the shareholders, as, without such co-operation of the two companies, perhaps no profit would be made;" and, in the course of the argument, Lord *Campbell* observed, with reference to the alienation of tolls, "It is outlay for the purpose of increasing dividends; a jury will decide whether it is *bonâ fide* or not."

This completely covers our case. At the next stage—the hearing of the cause—the Master of the Rolls, without expressing any opinion of his own, followed the judgments of Lord *Cottenham* and the Queen's Bench on the question of illegality, but dismissed the bill, on the ground that the time had not arrived for carrying out the agreement.

Then came the appeal before the Lords Justices; and they held, that the agreement could not be enforced in equity, Lord Justice *Knight Bruce*, however, reserving his opinion as to the legal point.

When the case came on appeal before the House of

Lords (a), Lord *Cranworth* studiously avoided giving any decisive opinion on the question of illegality, though he inclined to think, that the agreement was too one-sided to be enforced in equity; but the judgment went on the independent ground on which the Master of the Rolls had acted.

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Then the Plaintiff has been for years a shareholder in one of the companies, and has received dividends under and acquiesced in this arrangement. He became a shareholder in the *London and North-Western* Company for the purpose of instituting this suit in the interest of the *Midland* Company. The Plaintiff, therefore, is bound by his acquiescence, and cannot sue on behalf of all the shareholders to impeach the agreement: *Graham v. Birkenhead Railway Company* (b).

Mr. *W. D. Gardiner*, for the *Lancaster and Carlisle* Railway Company, cited *Hodgson v. Powis* (c).

Mr. *J. F. Miller*, for the *Caledonian* Company, cited, on the question of acquiescence, *Kent v. Jackson* (d), *Re Magdalena Steam Company* (e), *Burt v. British Nation Life Assurance Association* (f), *Ffooks v. South-Western Railway Company* (g).

Mr. *Daniel*, Q.C., and Mr. *T. Stevens*, for the *Great Northern* Company:—

The clause in the special Act, directing how the profits are to be distributed, does not extend to limit any discretion which may be exercised as to the mode in which

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| (a) 6 H. L. Cas. 113. | (d) 14 Beav. 367. |
| (b) 2 Mac. & G. 146. | (e) Johns. 690. |
| (c) 7 Railw. Cas. 956; 8. C. | (f) 4 De G. & J. 158. |
| 1 De G., M., & G. 6. | (g) 1 Sm. & G. 142. |

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these profits may best be realised, whether by competition or by arrangement. A similar clause in a partnership deed would be no bar to an analogous arrangement between the firm and other carriers.

Then the 87th clause of the Railways Clauses Act, taken together with the 92nd, is sufficient to authorise a traffic arrangement of this description.

Mr. *Giffard*, Q.C., and Mr. *Hobhouse*, for the *North-Eastern Company*:—

The two grounds on which this agreement is attempted to be impeached must be kept separate. As to the interests of the public, they have nothing to do with the division of the profits; and this is not a case where the Attorney-General comes, on behalf of the public, to complain of an arrangement creating an injurious monopoly.

The Plaintiff, therefore, must confine himself to the alleged fraud on the shareholders; and, as to that, he is met by a case of acquiescence stronger than any in the books, except, perhaps, *Burt's case*. From 1851 to 1856, the previous agreement was known to the Plaintiff and acquiesced in by every shareholder. Then it was renewed for a term of fourteen years, and no one denied that it was beneficial. It is quite true, that Lord Justice *Turner*, in the *Shrewsbury case*, says, that a railway company cannot alienate its tolls; but, of necessity, that statement must be qualified. A company must expend portions of its tolls on matters not expressly authorised by its Act—as, on electric telegraphs, engine factories, and a multitude of other incidental matters. That is to say, an alienation of profits for the purpose of increasing the profits of the regular business of a company is necessary and lawful. Further, if all the shareholders were to agree to an actual alienation of tolls in favour of one class of them,

that would be binding; and all the shareholders in the *London and North-Western Railway*, including those from whom the Plaintiff bought, have acquiesced in this arrangement.

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The penal clause creates no additional difficulty, because, if the agreement was good, the penalty to enforce it must be good also. It is only fixing liquidated damages.

[They also cited *Lancaster and Carlisle Railway Company v. North-Western Railway Company* (a).]

Mr. Willcock, Q.C., and Mr. Boyes, for the *North British Company*, referred to the 122nd section of the Companies Clauses Act, which authorises directors to set apart sums for contingencies and improvements, and to divide the balance only.

Mr. Colt for the *Edinburgh and Glasgow Company*.

Mr. Archibald Smith for the *Midland Company*.

Sir H. Cairns in reply :—

It is admitted, now, that the purpose of the agreement was not to benefit the public, but to prevent competition; but I will first deal with the alleged case of acquiescence; and, for this purpose, I assume, that the agreement is ultra vires. When there is a single act done, once for all, resulting in a money demand (as any improper dealing with the assets of a company), there acquiescence is conclusive, because it is equivalent to a release; and a release would be valid. So, also, where the act complained of is an unauthorised loan. All the authorities where the decision has rested upon acquiescence are either of this kind, or else they have been cases where the application has been interlocutory, and the Court has

(a) 2 Kay & J. 293.

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refused to exercise its discretionary power upon an interlocutory motion in favour of a Plaintiff, who has acquiesced in the alleged injury. This was the principle of *Graham v. Birkenhead Railway Company*, *Efooks v. South-Western Railway Company*, and *Hodgson v. Powis*.

Burt v. British Assurance Association was a decision at the hearing, proceeding on the ground I first mentioned. It was a concluded transaction, resulting in many liabilities and Lord Justice *Knight Bruce* puts it on the footing of a release.

But this principle has never been applied to prevent a continuing agreement, in itself ultra vires, from being impeached. In *Bagshaw v. Eastern Union Railway Company* (a), the Vice-Chancellor says of such an act, "Even unanimity would not make it lawful." If there were an actual contract signed by every shareholder to use the capital of a railway company for an unauthorised purpose, the Court would treat it as nudum pactum; and no acquiescence can come as high as that. In fact, the acquiescence is as much ultra vires as the agreement itself. Otherwise the Legislature would have no control over the companies it created.

Then, as to the legality of the agreement. It is clearly not a case of through traffic under the 87th clause. The East route and the West route have not a mile of railway in common. They are not parts of a continuous line, but independent routes between the same termini. Putting that pretext aside, I come to the main question raised, whether this agreement is ultra vires. In defence of it, it is said, first, that it does not contemplate a parting with profits, because it provides for payments which are intended as a means of increasing profits; and that the real profits divisible among the shareholders are the balance remaining after all such expenses. The answer to this is, that it

(a) 7 Hare, 114, 129.

proves too much. If it is the true principle, then any expenditure would be lawful which was designed to increase the dividends of the company. A railway company, for example, might set up a hotel, or buy steam-boats, or do any thing which was thought likely to pay. It is settled, that it is illegal for a railway company to increase its traffic and dividends by establishing a line of steamers as feeders. If it buys off competition, say, by paying a line of steamers for not competing with it, can that be less illegal? It is the same thing to buy off a competing railway; and that is what this agreement is designed to do.

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[The VICE-CHANCELLOR.—There is a difference. In the one case, the company takes up a trade distinct from that for which it was incorporated; in the other, it buys off opposition to its legitimate business.]

Sir *H. Cairns*.—There are two objections to such a course: one, on behalf of the public, who are interested in competition; the other, on behalf of the shareholders, who are interested in the proper application of the profits.

In *Colman v. Eastern Counties Railway Company (a)*, a subsidy to a steam-boat company was held illegal.

It was argued, that, as one carrier may buy off another, so may a carrying company; but the distinction is, that a company is not *sui juris*. Then it is said, that it is optional with railway companies to act as carriers; but, if they hold themselves out as carriers over their line, they must act up to that representation, and cannot agree to fetter themselves by special prohibitions. Then it is said, that this is within the general power of conducting the carrying business. But this is not so. They have all powers necessary to maintain their line and to carry passengers and goods upon it, but they have no power to spend money simply to attract traffic: Companies Clauses Consolidation Act (*b*), *Simpson v. Denison*.

(a) 10 Beav. 1.

(b) Sects. 115—120.

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With respect to the Queen's Bench decision in the *Shrewsbury case*, the *River Dun case* and also the *East Anglian Railway Company v. Eastern Counties Railway Company* (a) are directly opposed to the doctrine there laid down. *Beman v. Rufford* (b) is also in our favour. The judgment of Lord *Cottenham* on the demurrer, has been overruled. The doctrine, that an agreement is to be upheld if not necessarily injurious to the shareholders, cannot now be followed. It is directly opposed to the judgment of the Common Pleas in the *East Anglian case*, and to that of the Lords Justices in the *Shrewsbury case*, and, to a certain extent, to that of the Lord Chancellor in the House of Lords.

I admit, that, on the ground of acquiescence, we are debarred from asking an account except from the time when we first objected to the agreement, but otherwise we are not affected.

[As to the costs, he cited *Munt v. Shrewsbury and Chester Railway Company* (c).]

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VICE-CHANCELLOR SIR. W. PAGE WOOD:—

This is a bill filed by a shareholder in the *London and North-Western Railway*, on behalf of himself and all other shareholders, against that company and seven other companies, parties to an agreement termed the octuple arrangement, for regulating the traffic on the different lines. The bill seeks an injunction against the directors of the *London and North-Western Company*, to restrain them from carrying this agreement into effect, and from mixing up their revenues with those of the other companies or alienating their tolls to them. The questions raised are, first, the legality or illegality of the agreement itself; and,

(a) 7 Railw. Cas. 150.

(b) Id. 48.

(c) 13 Beav. 1.

secondly, the competency of the Plaintiff to apply to have it set aside.

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With regard to the argument against the validity of the agreement, I may clear the ground of one objection, by saying, that I see nothing in the alleged injury to the public arising from the prevention of competition. I find no indication, in the course taken by the Legislature, of an intention to create competition by authorising various lines. From my own experience in Parliamentary committees, I should rather be disposed to say, that the Legislature wisely inclined to avoid authorising the construction of two lines which would necessarily compete with one another. It is a mistaken notion, that the public is benefited by pitting two railway companies against each other till one is ruined, the result being, at last, to raise the fares to the highest possible standard. The Legislature protected the public in a different way, by a provision limiting the maximum of tolls to be taken, and, with respect to fares, it guarded against excessive profits by an enactment in the 7 & 8 Vict. c. 85 (a), that, in the event of the profits reaching 10 per cent., the Treasury may revise the scale of fares, and that the Board of Trade may, under certain conditions, purchase the line. Except by fixing a maximum rate of tolls, and, as far as practicable, a maximum amount of profit, the Legislature has imposed no conditions in favour of the travelling public. I cannot have any doubt, that it is competent for a railway company to abstain altogether from carrying. If a company enters upon the carrying business, it is bound to carry on equal terms for all; but I find in the Acts no obligation upon a company to become carriers, except as to the mails and the Queen's troops. On the contrary, it is plain, throughout all the statutes, from the 7 & 8 Vict. c. 85 to the 22 & 23 Vict. c. 59, that carrying was meant to be optional

(a) Sects. 1, 2.

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with the companies; and that the Legislature contemplated the probability, or possibility, of the companies declining to act as carriers. Probably it contemplated, that the carrying business on short lines might be conducted by arrangement with larger companies; and that the directors might be content with taking tolls from them for the use of the line. At any rate it is clear, that Parliament, with how much foresight it is not necessary to consider, did at first contemplate, that other persons or companies, than the railway company itself, might undertake the carrying business.

I must, therefore, dismiss from consideration the arguments founded on the notion, that the companies were under any obligation to carry on their traffic with a view to keep up competition, and proceed to the real question on which the legality of this agreement depends. It may be briefly stated thus :—There are two lines of connected railways, one forming the West Coast, the other the East Coast, route; and the question is, how far the companies, owning these distinct groups of lines, are justified in coming to an arrangement, by which, having calculated the probable amount of traffic which would, in the ordinary course, flow over the one or the other route, they agree for a certain period of years, to take this calculated proportion as the basis of their arrangement; and provide, that accounts shall be kept on this footing, and that, if the actual earnings of either set of lines shall differ from the estimate, the difference shall be made good, after allowing for working expenses, by payments from the one set of companies to the other. That is the substance of the agreement, and, looking at the state of the authorities, there is certainly much to be said on both sides of the question, whether such an arrangement is legal or not. The difficulty consists in applying the principles which have been established to cases which lie on the border line of what is and what is not lawful.

The general rule as to contracts *ultra vires* is laid down in a very strong form in the case of *Beman v. Rufford*, by Lord *Cranworth*, who says, "It is the province of the Court to prevent such a contract from being carried into effect; for it has often been laid down, that this Court will not permit parties, having the enormous powers which railway companies obtain, to apply one farthing of their funds in a way which differs in the slightest degree from that in which the Legislature has provided that they should be applied." That is the very strongest way of stating the principle; and it must not be assumed, that the learned judge meant his language to be interpreted too literally, but the effect of it is, that the funds of a company, constituted for a particular purpose, must not be applied in any manner which Parliament has not sanctioned. This brings me to a consideration, urged on behalf of the Defendants in various shapes, but always coming to one point. You find a company created which, being a corporation, has the power of contracting under its corporate seal. Such a company must, *primâ facie*, be bound by its contracts no less than an individual; and, therefore, it is said, that those, who impeach the legality of any such contract, are bound to show that the company is prohibited from entering into it. This is, perhaps, putting the point in too strong a form; and I prefer the enunciation of the doctrine contained in the judgments of Lord Justice *Turner* and Lord *Cranworth* in the *Shrewsbury case*. The general principle is there stated by Lord Justice *Turner*(a):—"In determining questions of this nature, Courts of justice, as I apprehend, are bound to consider, not what in their judgment may be most for the interest of the public but what was the scope and object of the law which is said to be infringed or attempted to be infringed. What we have to consider, therefore, is the scope and objects of the Acts of Parliament from which

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(a) 7 Railw. Cas. 600.

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these companies and other railway companies (for there is nothing in this respect peculiar to these companies) derive their power. The great undertakings of these companies could not be carried into effect by private enterprise alone, and Parliament, therefore, with a view to the public good, authorised the constitution of large bodies, acting by directors, for the purpose of carrying them out. But these bodies have no existence independently of the Acts which create them, and they are created by Parliament, with special and limited powers, and for limited purposes. When, therefore, they exceed or attempt to exceed their powers, or to go beyond the limits of their incorporation, they are acting in contravention of the law which created them, and in opposition to that which Courts of justice are bound to consider to have been the object of Parliament in their creation."

Lord *Cranworth* puts it very much in the same way. In the course of the argument in the House of Lords (a), his Lordship observed, "Primâ facie, a corporation may contract under seal. You must show, that the particular contract is one which the corporation has no power to enter into. It must be shown on the face of it to be a breach of duty—something foreign to the object for which the company was established."

This comes near to the view presented on behalf of the Defendants, namely, that you must show a prohibition in terms or in substance in order to prove the illegality of any act. Lord Justice *Turner* says, that you must look, not for a prohibitory clause but to the whole scope of the Act, to see whether the contract is consistent with the limited purpose for which the company was incorporated. A railway company is incorporated for the purpose of making a particular railway, and for conducting the carry-

(a) 6 H. L. Cas. 124.

ing trade in connection with it, but not for the purpose of acting as a general carrying company. Therefore, it cannot carry on a canal undertaking, or engage in steam-boat traffic.

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Having thus referred to the general principle, I proceed to consider the nature of the contract itself, and the grounds of objection urged against its validity, before discussing more fully the authorities bearing on the case, and especially the *Shrewsbury case*. The agreement purports—and, I think, honestly purports—to be an agreement of this kind:—It recites the position of the several companies, as owners of the East and West Coast routes, and as common carriers, and, after referring, not very accurately, to the 87th clause of the Railways Clauses Consolidation Act, it recites, that it is of importance to the several companies and would tend to the accommodation of the public, that arrangements should be made with a view to insure the regular working and management of the traffic between *London* and *Edinburgh, Glasgow* and the north of *Scotland*, by both these routes, and also to and from intermediate places common to these companies. That is, perhaps, rather a vague way of stating the real purpose of preventing ruinous competition; and the interests of the public are certainly put forward very prominently, though not altogether without reason, because a good understanding between the different companies conducting this traffic, though it may not in one sense be for the immediate advantage of the public, inasmuch as it may tend to raise fares, is, nevertheless, in the end, beneficial, by preventing the ultimate raising of fares, as the consequence of ruinous competition, and also by promoting the convenience of travellers.

These being the recitals, I come now to the essential part of the agreement on which the question turns. The

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parties to it say, in effect, that they have ascertained that the traffic between a number of places, set out in the schedule, will, if left unfettered, go in certain proportions over the different routes; and, on the face of it, the schedule looks reasonable enough. Having settled these tables, the several companies agree, that this estimated distribution of traffic shall be taken to be the amount which, in the ordinary course, would go over their respective lines; and then they agree, that if it shall appear, that any one company has received more than the calculated proportion, the surplus, subject to a deduction for working expenses, shall be divided among the companies, in such a way as to give to each the share which would have accrued to it, if the traffic had actually been distributed in the exact proportions mentioned in the schedules. An instance of the working of this arrangement is given in the bill, by which it appears, that, for the half-year ending at Christmas, 1857, the *London and North-Western* Company, and the other owners of the West Coast Route, had to pay over to the other companies a balance of upwards of £7000 in respect of the traffic between *London* and *Glasgow*, of which sum £3800 was paid by the *London and North-Western* Company. If this is the strongest example to be found, it is a remarkable evidence of the accuracy of the estimated proportions, the amounts being almost infinitesimal compared with the total amount of the traffic. Still, we have the undisputed fact, that a portion of the earnings of the *London and North-Western* Railway were, in pursuance of the agreement now in question, handed over to other companies.

Undoubtedly, up to a certain time, the authorities were very severe against the application of the funds of such companies to purposes which have been considered foreign to the objects for which they were incorporated; and, in applying the principles laid down in such authorities, the

question is, how far an arrangement, of the kind I have described, is to be considered as consistent with the purposes for which the several companies were incorporated. Many of the authorities cited may be laid aside, at once, as inapplicable. These are, first, those which turn upon the application of a company's capital to the construction of a part only of the line originally proposed. Then there is the class of cases, where companies have embarked in undertakings, which, though convenient accessories to a railway, are, nevertheless, essentially distinct speculations, as, for example, where a railway company become the owners of a line of steam-boats. In all these cases, a principle of public policy applies, which does not touch the present case, namely, that Parliament, having authorised a company to raise a large capital for one specific purpose, confers no right upon the company to employ their capital, in competition with the general public, upon speculations of a different kind. Among this class of transactions, that which is most analogous to the present is the subsidising of a steam-boat company by a railway company, as, by paying so much per head for every passenger brought by the steam-boats on to the railway; but even this is far beyond anything which has been done in the case before me.

Having regard to the rule of limiting a company to the purposes for which it was incorporated, those general purposes may be described to be, in the case of a railway company, to carry on traffic upon its own railway, and further, to carry on traffic in conjunction with other railways. The 87th section of the Companies Clauses Act cannot be put higher than that. A railway company, being authorised to act as carriers, may contract to carry, for example, from *London to Paris*, and may fairly say, "It is our business to see that this contract is performed; and we must do so in the best way we can." Where a com-

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pany is engaged, *bonâ fide*, in carrying over its own line at starting, it is not only authorised but encouraged to take every step, which is necessary for forwarding the goods it has taken charge of, and has power to bind its shareholders to the consequences of extending its carrying traffic, in this way, beyond the limits of its own line. That would not justify the holding of shares in a steam-boat company, but it would justify any arrangement with a steam-boat company for what is called through booking, by which each company takes a certain proportion of the whole fare.

Then comes this question:—A railway company being authorised to conduct a carrying business, how far is it allowed to do that, in the most profitable way, by means of arrangements with other companies, for carrying on the business in some limited fashion? If one company agree with another not to carry between particular places, in consideration of having the forwarding of all the traffic beyond those limits, I see nothing objectionable in that. Again, these companies might say, “Our lines form a continuous loop, and we will agree each to run over the other’s portion of it;” and a variety of modes might be suggested (and this, without any question of injury to the public), in which this agreement might have been framed, without assuming the more questionable shape which it has taken. All that they do say is, that they will all be carriers; that they have ascertained the proportions in which the traffic would divide itself; and that, to prevent any unfair advantage being taken, any surplus which may be realised by any company, beyond this proportion, shall, subject to an allowance for working expenses, be paid over to the other companies. The same result might have been obtained by imposing a certain sum as liquidated damages, for each breach of the agreement; and there might be other forms into which it

would have been feasible to throw the agreement. Still, in whatever shape the arrangement might have been cast, the same difficulty must have presented itself. You have the fact, that, if traffic comes upon one railway, money is earned by it, and part of that money is, by virtue of this arrangement, paid over to another company, whose line, so far as this particular traffic is concerned, has no direct connection whatever with that of the first company.

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Before turning to the authorities, I have also to consider, how this case comes before the Court. There are three distinct classes of cases:—First, those, like *Foss v. Harbottle*, where the act complained of is some act ultra vires as to the directors, but not beyond the competency of the company. There the Court refuses to interfere. Secondly, those cases, where the whole company is incompetent to do the act complained of, it being illegal, either with regard to the shareholders or the public, or both. A familiar instance of what has been held to be illegal, as regards shareholders, is the application of corporate funds to soliciting a new Act of Parliament (certainly a strong example). As to injury to the public, I need not now dwell upon that, because the public interests are very little concerned here, though, possibly, upon the intervention of the Attorney-General, there might be some case of the kind to consider. The third class of cases consists of those, where the capital of a company is applied to enterprises in which it is not authorised to engage, which includes the cases of railway companies working steam-boat traffic, engaging in the sale of coals and the like. Here both the shareholders and the Attorney-General have a right to ask the interference of the Court.

In the first place, let me consider what the shareholder's position is. His interest is to gain the largest possible amount of profit. As between him and the directors, if

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the directors find that (without entering into any foreign speculation) the largest amount of profit is to be made by granting to other companies a certain proportion of their traffic, and securing corresponding advantages to their own company, it is not very obvious that the shareholder is injured. It would be difficult, no doubt, to find in the letter of the law any express authority for such an arrangement, because the company is only authorised to construct its own line, to carry upon it, and to enter into contracts for through booking. There is no specific enactment to enable such an arrangement, as I have mentioned, to be carried out. Still, the question is, whether the general powers of doing what may be necessary to carry on the traffic of the line do not cover the case; and I confess, that, but for the authorities on the subject, I should feel much difficulty in saying, that there is in such a course anything which a shareholder is entitled to treat as a wrong to himself. When, in the judgment of the directors, and of the company assembled in general meeting, it is found advantageous to give up certain contingent profits, in order to secure certain other profits expected from the arrangement, an individual shareholder does not seem to have any right to treat such a contract as an injury to himself.

Then, again, with regard to the interests of the public, it is not easy to see that there is any damage to them, considering the benefits they derive from a uniform system of traffic management.

However, on looking to the authorities, one finds an unfortunate amount of conflicting opinion. The question in the *Shrewsbury case* came, at various times, before seven equity and seven common law judges. They did not all express an opinion as to the question of legality, the Vice-Chancellor of *England* and Lord Chancellor

Truro having abstained from doing so. Lord *Cottenham*, however, expressed a very decided opinion in favour of the validity of the contract in that case, and Lord Justice *Turner*, an equally clear opinion against it. In the interval between these judgments, the Master of the Rolls, without giving any definite opinion of his own, decided the case, as it stood before him, on the ground that Lord *Cottenham* and four common law judges had pronounced in favour of the contract. Lord Justice *Knight Bruce* seems to have carefully avoided any specific statement of his opinion as to the point which came before the court of law; but his view as to the authority of the directors appears to have been adverse to the principle contended for by the Defendants in the present case, though I should add, that it was partly founded on the particular circumstances of the case as before him. Lord *Cranworth's* opinion may be said to be balanced, though inclining, perhaps, rather to the view of Lord Justice *Turner* than to that of Lord *Cottenham*. In *Beman v. Rufford* (a), he intimated an opinion rather adverse to Lord *Cottenham's* view in the *Shrewsbury case*; but, upon the appeal of the *Shrewsbury case* in the House of Lords, he appears to have considered the question as exactly in medio—apparently treating the authorities at law as a counterpoise to what had weighed upon his mind in *Beman v. Rufford*. That is the position in which the question is left. There are two positive opinions—that of Lord *Cottenham*, the one way, and that of Lord Justice *Turner*, the other; while the other five equity judges who have had the question before them, Lord *Truro*, Lord *Cranworth*, Lord Justice *Knight Bruce*, Vice-Chancellor *Shadwell*, and the Master of the Rolls, may be regarded as neutral.

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This being the state of the authorities in equity, I find the Court of Queen's Bench, comprising Lord *Campbell*,

(a) 7 Railw. Cas. 76.

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and Justices *Pattison*, *Coleridge*, and *Wightman*, unanimous in favour of the validity of the contract.

It remains only to consider, how far the *Shrewsbury* case governs the case now before me. Now it seems to me, that the *Shrewsbury* contract was much more open to attack, by a shareholder, than the one on which I have to adjudicate. It was a contrivance to evade the consequences of having failed in an attempt to obtain certain leasing powers. It bound the *Shropshire* Union Company, for ever if the *Shrewsbury* Company thought fit; while the latter company had the privilege of putting an end to the agreement at six months' notice. The effect of the agreement, moreover, was to constitute a complete partnership in every sense, because the whole profits over the specified lines were to be divided in fixed proportions. The distinction may be somewhat a technicality, but still, so far as form is concerned, the objection to the legality of the contract was much stronger in the *Shrewsbury* case than in the present. The mode in which the point was raised in equity was again more favourable to the Defendant, who impeached the contract, than an action at law by a shareholder. The Court was asked to exercise its discretionary jurisdiction by injunction; and Lord Justice *Knight Bruce* rested his judgment mainly on the ground, that it was not a fit case for such an interference of the Court. The same view prevailed in the House of Lords.

Lord *Cottenham's* decision, independently of the very great authority of that learned judge, must be regarded as an especially strong authority, for this reason:—When the merits of Lord *Cottenham* as an equity judge come to be weighed hereafter, one of his marked characteristics will be found to be the skill and boldness with which (as, for example, in *Wallworth v. Holt* (a),) he

accommodated the practice of the Court to new commercial exigencies. Whether as regards the interests of shareholders or of the public, Lord *Cottenham* was the last man to shrink from restraining, with a strong hand, any undue exercise of power by a company; and, therefore, when I find him taking a view favourable to the company, his opinion is entitled to even more than the weight which would always belong to it. What he says as to the general principle is this (a):—"Speaking now of this through traffic, what is the effect of this through traffic? That applies as well to the objection made, of its being inconsistent with the duties which the parties owed to Parliament—a fraud on Parliament—as to any supposed illegality arising from a breach of duty towards their constituents or towards the public. Why, the Plaintiffs, having a railway, which it was their duty to protect for the benefit of their constituents, had a very natural anxiety—a very natural dread—that they might be very much injured by so powerful a company as the *London and North-Western* Company having a line in competition with themselves—though not in point of distance so convenient, yet having the power, which so large a company must have, by so large a number of people travelling upon it, and being so much better known than a minor company. They had a dread, also, that a great portion of the traffic which they relied on for supplying their line would be withdrawn by another line being opened, having the same termini. Now, their duty to their constituents—that is to say, their subscribers—was, as far as possible, to secure to themselves, by all lawful means, the most traffic they could get. They were apprehensive that they should lose their traffic. They thought, that what they had before reckoned on they would be deprived of; but, at all events, if it was a means by which, according to their

1861.
 HARR
 v.
 LONDON AND
 NORTH-
 WESTERN
 RAILWAY
 COMPANY.
 Judgment.

(a) 7 Railw. Cas. 559.

1861.
 HARE
 v.
 LONDON AND
 NORTH-
 WESTERN
 RAILWAY
 COMPANY.
 Judgment.

opinion, the greatest security was preserved to their subscribers of getting a fair and reasonable share of that traffic, how can it be a violation of duty? It is merely a different mode by which that object is secured and obtained. They had a right, and they were bound, to collect all they reasonably could of the fares payable by that traffic between *Willington* and *Rugby*, that being the line of their railway; they are afraid of being deprived of it, and they, therefore, enter into the arrangement with the *London and North-Western Railway Company*, and say, 'We will not compete with each other, which generally ends in injury to both; but people may travel which way they like, and we will not interfere to persuade them to go one way or the other; when we have ascertained how many have gone one way, and how many the other, we then will divide the profits arising from that travelling, in certain proportions, between ourselves.' That was a beneficial arrangement for their own subscribers; their subscribers cannot complain, the duty of the directors being to obtain the most they could."

No one can say, that the point I have to decide was not very fully before Lord *Cottenham's* mind; for every word of the passage I have cited is exactly applicable to the case before me. Lord *Cottenham*, it is true, does not deal so largely with the other branch of the question, which relates to the interests of the public; but, on that point, I have no hesitation in holding, that there is no obligation on railway companies to maintain a system of competition, in the supposed interests of the public.

Referring now to the judgment of Lord Justice *Turner*, he seems to have considered, that Parliament, with a view to public interests, fettered railway companies, by giving them only limited powers. Or, perhaps, it would be more accurate to say, that the judgment is based upon the view, that Parliament, when it authorized the construc-

tion of specific lines, and gave certain specific powers, did so without contemplating the possibility of such arrangements as were entered into in the *Shrewsbury case*, and in the present instance.

The principle is clearly laid down in one passage, which I will cite (a):— “ Parliament has given these companies power to interfere with private property, and has empowered them to levy tolls ; and it has protected the public against any undue interference on their part with private property. It has also secured to the public the benefit of their expenditure, by limiting and restricting their powers ; and how is it consistent with the protection thus thrown around the public, that they should be permitted to transgress the limits which Parliament has provided for the public security ? ” That, I think, is the strongest way of stating the case, with reference to the views expressed by Lord *Cottenham*. The Lord Justice added, that the cases had taken a wider range since Lord *Cottenham's* time ; and that he was not satisfied that the question was fully submitted to the consideration of the Court of Queen's Bench. In this last opinion Lord *Cranworth* does not appear to have concurred, for, in his judgment in the House of Lords (b), he observes, that he cannot reconcile Lord Justice *Turner's* opinion with the judgment of the Court of Queen's Bench on the demurrer to the fifth breach, “ for that demurrer clearly raised the question, whether the contract for division of profits was or was not a legal contract.”

The authorities in equity being such as I have stated, and four judges of the Queen's Bench having decided, that the contract in the *Shrewsbury case* was legal, what course ought I to pursue, if I were in doubt in my own mind ? I have stated my views of the principle ; but,

1861.
HARR
v.
LONDON AND
NORTH-
WESTERN
RAILWAY
COMPANY.
Judgment.

(a) 7 Railw. Cas. 601.

(b) 6 H. L. Cas. 138.

1861.
 HARR
 v.
 LONDON AND
 NORTH-
 WESTERN
 RAILWAY
 COMPANY.
 —
Judgment.

in such a conflict of authority, I prefer to treat my own opinion as dust in the balance, and simply to say, that I see no reason for differing from the opinion of Lord *Cottenham*. If my opinion were evenly balanced on the question, all I could do in the way of obtaining further aid would be, to apply for the assistance of two common law judges. This case is not presented in a form which admits of an action being directed, and I cannot send it to a Court of law for their opinion. If I were to have the case reheard, with the assistance of common law judges, I doubt, whether their opinion ought to counter-vail the deliberate judgment of the four judges of the Queen's Bench who decided the *Shrewsbury case*; and, until that judgment is overruled by a higher authority, I think, I ought to adhere to it in a case which seems to be entirely parallel.

If I could feel any doubt as to the contract, it would be, whether, as a matter of prudence, it was right for companies to bind themselves for so long a period as fourteen years, during which great alterations in the course of traffic might occur; whether, in fact, it was reasonable to bind dissentient shareholders for so long a term. But, assuming the contract to be legal, and within the powers of the companies, this would be a mere question of expediency, and would have to be considered in connection with the broad fact, that substantially the same agreement has subsisted for ten years without a single complaint, except from one shareholder, and that one situated as the Plaintiff is. During these ten years, none of the companies have chosen to raise the question, as they might have done, in a court of law; neither has the Attorney-General attempted any interference on behalf of the public. Under these circumstances, which are very different from those of the *Shrewsbury case*, having to deal with a contract made bonâ fide with a view to ensure the present and most

beneficial arrangement of traffic, and framed with so much nicety that the balance payable by a large company like the *London and North-Western* has been extremely small—having the further fact, that the arrangement has been in force for many years without a complaint from any of the companies or their proprietors—I must say, that, even if the Plaintiff stood in the most favourable position possible, I should not feel justified in interfering in his favour.

1861.
HARR
v.
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NORTH-
WESTERN
RAILWAY
COMPANY.
—
Judgment.

The position of the Plaintiff is this:—For several years he was a shareholder of one of the companies, in whose favour the arrangement happened for that time to work, and shared in the extra profits which resulted from it. Now, circumstances having apparently changed; he has become a shareholder in the *London and North-Western* Company, and says, that it may be profitable to that company to break the agreement. He can find, so far as appears, not a single shareholder in that company to come forward and support his endeavour to set aside the agreement, nor, indeed, any one of the companies parties to the agreement; for the *Midland Company* simply maintained a neutral attitude in the argument. There is some evidence that the Plaintiff's proceedings have been taken in collusion with that company; and it would be a great aggravation of the case, if the Plaintiff were a mere man of straw, put forward to do, on behalf of that company, what they themselves could not venture to attempt. This would be very much stronger than the mere purchase by a company of shares in a rival company, for the sake of protecting themselves against any attempt of the latter to exceed the limits imposed by Parliament upon it. But what is suggested here is, that a company, bound by a special agreement, the benefit of which they have enjoyed, is seeking, in the name of the Plaintiff, to set it aside.

Even if I had more doubt as to the law, I should pause before extending so far the indulgence, which has some-

1861.
 HARE
 v.
 LONDON AND
 NORTH-
 WESTERN
 RAILWAY
 COMPANY.
 —
Judgment.

times been shown, to the practice of purchasing shares in rival companies, as to give relief to a Plaintiff, put forward in this way to impeach an agreement, which the company in whose interest he acts is precluded from questioning, by having long taken the benefit of it. In such a case, I should be inclined to act upon the views expressed by Lord Justice *Knight Bruce*, in *Rogers v. Oxford, Worcester, and Wolverhampton Railway Company (a)*. There, Lord Justice *Knight Bruce*, after referring to the opinion of Mr. Justice *Erle* in favour of the Defendants, adds, "But, if on the legal point there is room for doubt, the circumstances do not, in my judgment, render it imperative on the Court to act against the company or to retain the bill—to which the Attorney-General is not a party—a bill certainly not filed with any view to the benefit of the company or its shareholders, nor likely, I think, to be of advantage to them. It describes, with commendable accuracy, the Plaintiff's connection with the *Grand Junction Canal Company*, the managers of which, under the influence of motives obvious enough, but not including, I repeat, any wish to do good to the railway company or its proprietors, seem to have made him a shareholder in the railway company for the mere purpose of constituting this litigation, of which, in my opinion, it will be beneficial to these interests that he professes a desire of protecting, and be right, to dispose without more delay, by dismissing the bill with costs (*b*).” However, in the present case, it is unnecessary, except with reference to the costs, to dwell on that class of authorities. My judgment is founded on the opinions of Lord *Cottenham* and the Court of Queen's Bench in the *Shrewsbury case*; and I hold the agreement before me not distinguishable in principle from that on which they adjudicated.

It is not desirable to discuss any extreme cases which may be suggested. The Court will deal with them when they arise. Finding a contract, certainly not less ob-

(a) 2 De G. & J. 662.

(b) Id. 674.

jectionable than this, upheld by Lord *Cottenham* and the Court of Queen's Bench, I think it right to base my judgment on that ground, and to say, that, whatever might have been the position of the Plaintiff, the bill ought to be dismissed with costs.

1861.
HARE
v.
LONDON AND
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WESTERN
RAILWAY
COMPANY.
Judgment,

With respect to the question of parties, I find one instance in which Lord Justice *Knight Bruce*, when Vice-Chancellor, refused relief in an analogous case, on the ground, that all the companies, parties to the agreement, were not before the Court. I am, therefore, fortified in the view, on which I acted before, that all the Defendants were necessary parties, Otherwise, the *London and North-Western* Company might have been put in the position of being restrained from doing that, which they might be subject to an action at law for not performing.

With respect to the point of acquiescence, I agree with the argument of Sir *H. Cairns*, that the reported cases on the subject of acquiescence are of a different description from this. Where an act is done once for all—as the irregular expenditure of money, for example—this defence rests on a different basis. *Graham v. Birkenhead Railway Company* is the only case which, from this point of view, bears at all upon the present. There something did remain to be done to carry out the transaction, but still a counter-equity existed. Here it is not a question of acquiescence in an act which has been completed, but whether a Plaintiff, after accepting money, in the shape of increased dividends under an agreement—which is much more than a mere submission to the will of the majority of shareholders—can turn round, and take the opposite view, and ask that the agreement may be set aside. This consideration would have made me pause before granting the prayer of the bill, even if I had more doubt than I have as to the legality of the contract. Upon the question of legality, however, without the aid of other considerations, I must dismiss the bill with costs.

1861.

Nov. 16th.

Pleading—
Declaratory
Decree—Reversionary
Interest—13 & 14 Vict.
c. 35—

Mode of framing a special case so as to enable the Court, in some cases, to make a declaration, in the lifetime of a tenant for life, with regard to the interest of a party claiming in remainder.

Although, in the lifetime of a tenant for life, the Court has no jurisdiction, upon a special case, to declare, whether an interest limited in remainder is vested or void for remoteness, yet it is competent to the Court to declare, "Whether the person claiming in remainder takes such an interest in the property in question, as to entitle him to file a bill to have it secured for his benefit."

Argument.

1 Henry 4 8th 409

3 Ch 95—
4 29 576

BELL v. CADE.

A SPECIAL CASE.

Joseph Lawless, by his will, in 1840, bequeathed the residue of his personal estate to trustees, upon trust, to set apart £2000 in their names, "to be held by them in trust for his daughter *Harriet Bell* and her child or children," the said sum to be invested in the names of his said trustees, and the interest to be paid to his said daughter during her life; and after her death, to pay and divide the said principal trust fund of £2000 equally between and amongst her children, if more than one, equally, on attaining the age of twenty-four years, and if but one, to pay the whole sum to such only child on attaining such age; and in the mean time, the interest or dividends to be applied for the use and benefit of such child or children, as the case might be. And, as to the residue of the said trust funds, after setting apart the said £2000, the testator gave the same upon trust for his son *William Lawless*, since deceased, now represented by the Defendant *Eliza Cade*.

The testator's daughter *Harriet Bell* (afterwards *Kingcombe*) had one child only, the Plaintiff, *Harry Bell*. She was now of the age of fifty-four years.

The question in the special case was, "Whether
" the trusts declared of the legacy of £2000 by
" the will of *Joseph Lawless* are not valid and
" subsisting trusts; and whether the Plaintiff did
" not, at his birth, take a vested interest in re-
" mainder therein: or whether the said trusts are
" not void for remoteness."

Mr. Jolliffe (in the absence of *Mr. Rolt*), for the Plaintiff, was stopped by the Court.

The VICE-CHANCELLOR.—The Plaintiff's mother, who is tenant for life, appears to be still alive. The interest, therefore, which the Plaintiff claims, is still reversionary, and it has been repeatedly decided, that the Court has no power, under Sir *George Turner's Act* (a), to make a declaration in the lifetime of a tenant for life with regard to the interest of any party claiming in remainder expectant upon that life estate (b). Even under the Chancery Amendment Act (c), the Court has not power to make such a declaration in the lifetime of the tenant for life, except where there is something to be done, e. g. an estate to be administered, or relief granted for which the declaration is necessary (d).

1861.
BELL
v.
CADE.
Argument.

Mr. *Giffard*, Q.C.—All parties concur in waiving all objections of that description, and are very desirous that the question should be decided in the lifetime of the tenant for life.

The VICE-CHANCELLOR.—No consent will be sufficient. The Court has no jurisdiction. Any declaration I might make would be waste paper.

*Judgment on
the preliminary
Question.*

You may amend the special case by putting the question in this form :—"Whether, under the trusts declared of the legacy, the Plaintiff takes a vested interest in remainder therein, so as to entitle him to file a bill for the purpose of having the fund secured for his benefit." That would give the Court jurisdiction upon the special case. I know of no other way of obtaining a decision upon the question, except by converting the special case into a bill, to which the Defendant shall demur.

(a) 13 & 14 Vict. c. 35.

(c) 15 & 16 Vict. c. 86, s. 50.

(b) See *Gosling v. Gosling*, Johns. 265, and cases there cited. Also, *Morgan's "Statutes,"* &c. page 131.

(d) *Gosling v. Gosling*, ubi *suprà*.

1861.
BELL
v.
CADE.
Argument.

All parties agreeing that the special case should be thus amended—

Mr. *Jolliffe* proceeded to argue, that, under the trusts in question, the Plaintiff, on his birth, took a vested interest in remainder, so as to entitle him to file a bill for the purpose of having the fund secured for his benefit: *Saunders v. Vautier* (a), *Watson v. Hayes* (b). Here, under the maintenance clause, the entire interest is applicable, after the death of the tenant for life, for the benefit of her children until they attain twenty-four.

Mr. *Giffard*, Q.C., and Mr. *E. F. Smith*, for the Defendant, *Eliza Cade* :—

The trusts in question are void for remoteness, for no child is to take who does not attain the age of twenty-four years: *Bull v. Pritchard* (c). There can be no difference between a gift, as in *Bull v. Pritchard*, to children “who shall attain twenty-four,” and a gift, as here, to children “on attaining twenty-four.” In both alike, the attaining of that age is part of the description of the parties who are to take.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD (without hearing a reply):—

This case is distinguishable from that of *Bull v. Pritchard*. The maintenance clause is for the benefit of every child, whether it attains the age of twenty-four or not; and, if so, all the authorities show, that the interest is a vested interest and not void for remoteness.

(a) Cr. & Ph. 240. (b) 5 My. & Cr. 125. (c) 1 Russ. 213.

The Decree will be :—

AMEND the special case by stating the question to be, "Whether, under the trusts of the legacy of £2000, the Plaintiff takes a vested interest in remainder therein, so as to entitle him to file a bill to have the same secured." And, upon the case being so amended,—

DECLARE that the Plaintiff's interest is a vested interest, so as to entitle him to file such a bill.

1861.

BELL
v.
CADE.

Minute of
Decree.

WILKS v. WILLIAMS.

A SPECIAL CASE.

Alice Midwinter, by her will, dated 1829, after directing payment of her debts and bequeathing certain specific and pecuniary legacies, proceeded as follows:—"The principal of the residue of my property, after my just debts and legacies are paid, I desire my under-mentioned trustees to invest the same in the Public Funds. The interest of the same I leave to *Fanny Williams* and *Rebecca Wilks*, to be paid to them half-yearly, share and part alike, for their sole use and maintenance; and their receipts shall be the trustees' discharge. At the decease of the above *Fanny Williams* and *Rebecca Wilks*, the half-yearly dividends are to be continued to their children till they come to the age of twenty-one years. I constitute and appoint *Benjamin Hill* and *George Dace* trustees for the said *Fanny Williams* and *Rebecca Wilks* and their children." The testatrix then appointed the said *Hill* and *Dace* executors of her will, but made no bequest over in the event of the children or

Nov. 11th &
22nd.

Will—Con-
struction—
Bequest of
Interest till
twenty-one—
Implied
Bequest of
Principal.

Testatrix, having, by her will, directed the trustees, who were also the executors of her will, to invest the residue of her property in the funds, left the interest to two nieces, to be paid to them half-yearly, and, at their decease, "the half-yearly dividends to be continued to their children till they came to the age of twenty-one years." She then "constituted and

appointed" the said executors (nominatim) trustees for the said nieces and their children. All the children of a deceased niece had attained twenty-one:—*Held*, that they were entitled absolutely to the moiety given to her for life.

1861.
 WILKS
 v.
 WILLIAMS.
 —
Statement.

any of them dying under twenty-one; nor any other residuary bequest.

The testatrix died in 1832, possessed of personal estate, the residue of which, after payment of her debts and legacies, produced a sum of £1700 Consols. The testatrix did not appear to have had any real estate.

Rebecca Wilks died in 1842, having had ten children, one of whom died in her lifetime, an infant and unmarried. The remaining nine were the Plaintiffs in the special case.

In January, 1860, the youngest surviving child of *Rebecca Wilks* attained twenty-one; and a question then arose, whether, in the events which had happened, the one moiety of the residue of the testatrix's property, to the interest of which *Rebecca Wilks* was entitled during her life, went to the children of *Rebecca Wilks*, or was undisposed of and went to the next of kin of the testatrix living at her death—now represented by the Defendants to the special case.

The question for the opinion of the Court was,
 “ Who are entitled to the moiety of the residue of
 “ the personal estate of the said *Alice Midwinter*, to
 “ the interest whereof the said *Rebecca Wilks* was
 “ entitled during her life ?”

Argument.
 —

Mr. *Archibald Smith*, for the Plaintiffs, contended, that they were entitled absolutely to the moiety in question. There was a clear gift for them until they attained twenty-one; and it could not be imagined, that the testatrix would show a concern for them when they did not want it, their parents being then bound to provide for them,

and leave off that care at the only time when they could be supposed to stand in need of it: per Lord *Macclesfield*, in *Newland v. Shephard* (a). There, as here, there was no devise over; yet Lord *Macclesfield* held, the intention was most plain, that the grandchildren should take absolutely on attaining twenty-one.

[He cited also, *Gardiner v. Stevens* (b), *Peat v. Powell* (c), *Hale v. Beck* (d), *Atkinson v. Paice* (e), *Crowder v. Clowes* (f), and *Goodright v. Hoskins* (g).]

Mr. *E. Charles*, for the Defendants, who represented the next of kin, contended, that there was no gift by implication to the children after they should attain twenty-one; but the moiety in question was undisposed of after that event, and passed to the next of kin of the testatrix living at her death.

Lord *Macclesfield's* decision in *Newland v. Shephard* had often been called in question. In *Fonnereau v. Fonnereau* (h), Lord *Hardwicke* said, he could see no reason to approve of that decision, as reported in *P. Williams*; and, with regard to *Atkinson v. Paice*, the terms of the will, as reported in the later edition of *Brown*, showed an intention to give the corpus until twenty-one, which was not the case here.

In *Fitzhenry v. Bonner* (i), where there was a bequest to testator's wife, for her and her son's support, clothing, and education, until the son should arrive at twenty-one, with a gift over in case he should die under twenty-one, Vice-Chancellor *Kindersley* held, that the son, on attaining twenty-one, took nothing by implication.

1861.
WILKES
v.
WILLIAMS.
Argument.

- (a) 2 P. Wms. 193.
- (b) 7 Jur., N. S., 307.
- (c) 1 Eden, 479.
- (d) 2 Eden, 229.
- (e) 1 Bro. C. C. 91.

- (f) 2 Ves. jun. 449.
- (g) 9 East, 306.
- (h) 3 Atk. 316.
- (i) 2 Drew. 36.

1861.
 WILKS
 v.
 WILLIAMS.
 —
 Argument.

Mr. *Archibald Smith*, in reply :—The reasons for which Lord *Hardwicke* is reported in *Atkins* to have disapproved of the decision in *Newland v. Shephard* (a) are not stated ; and that decision has since been followed.

Cur. adv. vult.

Nov. 22nd.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Judgment.

I have considered this case ; and I have come to the conclusion, that the Plaintiffs are entitled to the moiety in question.

I say nothing as to whether *Newland v. Shephard* was rightly decided. That was a devise of residuary real estate, as well as a bequest of residuary personalty ; and the trust being to pay and apply the produce and interest for the maintenance and benefit of the testator's grandchildren "until they should come to the age of twenty-one years, or be married," without issue, Lord *Mansfield* held, "the intention was most plain, that the grandchildren should have the surplus, both of the real and personal estates, after their age of twenty-one." Of that decision Lord *Hardwicke* is said to have disapproved, in *Fonnereau v. Fonnereau* (b) ; but for what reasons he disapproved of it the reporter does not state.

There is another class of cases, of which no one, I apprehend, will be disposed to disapprove, where it has been held, that, upon a devise or bequest, whether of real or personal estate, upon trust for the child or children of any person, until they attain twenty-one, followed by a gift over to a third person, in case the children do not live to attain twenty-one, there is a clear implication, that, if the children live to attain twenty-one, they are to take

(a) 2 P. Wms. 193.

(b) 3 Atk. 316.

absolutely. With that class of authorities, whatever may be said of cases like *Newland v. Shephard*, no one, I imagine, will be disposed to quarrel.

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WILKS
v.
WILLIAMS.
Judgment.

The present case occupies a sort of intermediate position between the two classes to which I have referred. Here the testatrix desires her trustees to invest the principal money, constituting the residue of her property, in the funds. She then leaves the interest to her nieces, *Fanny Williams* and *Rebecca Wilks*, to be paid to them half-yearly. At their decease, "the half-yearly dividends are to be continued to their children, till they come to the age of twenty-one years." And then comes this passage:—"I constitute and appoint *Benjamin Hill* and *George Dace* trustees for the said *Fanny Williams* and *Rebecca Wilks* and their children;" and the testatrix appoints *Hill* and *Dace* executors of her will.

That is much stronger in favour of the construction, for which the Plaintiffs contend, than anything in *Newland v. Shephard*. In *Newland v. Shephard* there was a mere devise upon trust for the grandchildren until twenty-one. But, here, the testatrix directs all the residue of her property to be invested by *Hill* and *Dace*;—she places the whole of that residue in their hands, and then constitutes and appoints the said *Hill* and *Dace* "trustees" (trustees, that is, of the entire residue) "for the said *Fanny Williams* and *Rebecca Wilks*, and their children." It is clear, that, upon these words alone, without the intermediate bequest of the dividends until the children should attain twenty-one, there would have been an absolute gift for the testatrix's nieces and their children. In an independent sentence, the testatrix appoints *Hill* and *Dace* executors of her will. In the absence of the clause constituting them trustees for the nieces and their children, it would have been their duty to pay the dividends, as directed, until the chil-

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 Judgment.

dren attained twenty-one. The insertion of that clause, therefore, must be looked upon as emphatic, and as indicating, that, after the children attained twenty-one, the trust for their benefit was still to continue.

The proper form for the answer will be this :—

Minute of
 Decree.

DECLARE, that the Plaintiffs, as the nine surviving children of *Rebecca Wilks*, deceased, are absolutely entitled to the moiety given to *Rebecca Wilks* for life, without prejudice to any question as to the representatives of their deceased sister, *Hannah Wilks*, being entitled to share with them in such moiety.

Nov. 4th.
 Practice—
 Record and
 Writ Clerk—
 Amended Bill
 —Indorsement
 requiring
 Appearance—
 15 & 16 Vict.
 c. 86—Service
 —Interrogato-
 ries—Answer
 —Time.

BARRY v. CROSKEY (No. 2).

IN this case, the bill (*a*) was filed on the 1st of May, 1861. On the 13th of June, it was amended, and an amended copy was served on the Defendant *Croskey*, who, on the 29th of June, was served with interrogatories, which he was required to answer.

Where Plain-
 tiff requires
 an answer to
 an amended
 bill, he must
 serve the De-
 fendant with a
 copy of such
 bill, indorsed
 in the form or
 to the effect set
 out in the
 schedule to the Act 15 & 16 Vict. c. 86, requiring him to enter an appearance within eight days.

The Defendant demurred, his demurrer with others was argued, and, on the 17th of July, an order (*b*) was made, allowing his demurrer, but with leave for the Plaintiff to re-amend his bill.

On the 31st of July, the bill was accordingly re-amended,

Service of a plain instead of an indorsed copy of such an amended bill is, in effect, an intimation to the Defendant, that no answer is required of him; and subsequent service of an indorsed copy and interrogatories is irregular, and may be set aside on motion by Defendant.

Course which Plaintiff should adopt to correct such an irregularity.

(*a*) Set out *suprà*, pp. 1—13.

(*b*) Reported *suprà*, pp. 29, 31.

and, on the 5th of August, a copy of the re-amended bill was served on the Defendant *Croskey*.

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BARRY
v.
CROSKEY.
Statement.

The copy so served was not indorsed in the form or to the effect set out in the schedule to the Act 15 & 16 Vict. c. 86, requiring the Defendant to cause an appearance to be entered for him.

On the 30th of August, the Plaintiff served the Defendant with a second copy of the re-amended bill, indorsed in the form set out in the schedule to the Act, and, on the 5th of September, with interrogatories to the re-amended bill.

It appeared, by an affidavit of the Plaintiff's solicitor, that the copy of the re-amended bill, served on the 5th of August, had originally upon it an indorsement, printed in the form set out in the schedule to the Act, but that the Record and Writ Clerk had cancelled such indorsement.

Mr. *Swanston*, jun., for the Defendant *Croskey*, now moved, pursuant to notice of motion, that the second service of the re-amended bill on the 30th of August and the service of the interrogatories to answer such bill might, so far as related to the Defendant *Croskey*, be set aside for irregularity, with costs, to be paid by the Plaintiff.

Argument.

The second service of the re-amended bill was clearly irregular, following, as it did, a service of a copy of the same re-amended bill without any indorsement. The Plaintiff's course has been irregular throughout. If he required an answer to the re-amended bill, he should have served the Defendant, in the first instance, with a copy, indorsed in the usual form, requiring an appearance within eight days, at the expiration of which the Plaintiff would have had eight days more for filing his interrogatories. Otherwise there would be no limit to the time a Plaintiff might claim for such a purpose.

1861.

BARRY
v.
CROSKY.
—
Argument.

Mr. C. T. Simpson, for the Plaintiff:—

The motion should be dismissed with costs. The Plaintiff's course has not been irregular. To obtain an answer to the re-amended bill, it was not necessary for him to serve the Defendant with an indorsed copy requiring an appearance. The Defendant had appeared to the original bill; he had not answered; no fresh appearance was required: the indorsement in question, therefore, was unnecessary; and all the Plaintiff had to do was to give notice of the re-amendment. This was the advice given him by the Record and Writ Clerk; and the advice was sound, and in conformity with the practice, which is thus stated in Mr. *Braithwaite's* "Record and Writ Practice of the Court of Chancery":—"If the Defendant to be served with a copy of an amended bill has appeared to the original bill and has not answered such bill, . . . no fresh appearance being required, an indorsement on the copy of the amended bill is unnecessary; notice of amendment is sufficient; and service of a copy of an amended bill without an indorsement is, in practice, regarded as 'notice of amendment.'"

The VICE-CHANCELLOR.—But Mr. *Braithwaite* goes on to say, in the next paragraph, "In all cases where an answer is required from a Defendant to an amended bill, an indorsement on the copy of the amended bill served for such Defendant is necessary" (a).

Mr. Simpson.—The Plaintiff acted upon the advice of

(a) Ibid. p. 307. Mr. *Braithwaite* gives the following reason:—"This necessity arises from the circumstance, that an answer can only be required by filing interrogatories; and the time for filing the interrogatories can only be limited by limiting the time for appearing.—See Order 16, 7th August, 1852."

the Record and Writ Clerk, that, under the circumstances of his case, an indorsement was not necessary.

1861.
BARRY
v.
CROSKY.
—
Argument.

If indorsement was necessary, then the service of a plain copy of the re-amended bill on the 5th of August was a nullity. This view is confirmed by a consideration of the old practice as to appearances to an amended bill. According to the old practice, where a complete defence had been made to the original bill, an appearance was required to the bill as amended: but, where an incomplete defence had been made, to which exceptions had been taken and allowed, there no new appearance was required upon the bill being amended. In the former case, the amendment was in the nature of a new bill, to which, as it were, a new subpoena was required. And so it is here. Here the demurrer which was allowed was a complete defence until the bill was re-amended; consequently, upon the bill being re-amended, a new appearance became necessary. Under the old practice, a new subpoena would have been required; and the Act 15 & 16 Vict. c. 86, having by the 3rd section substituted an indorsed copy of the bill in all cases where under the old practice a subpoena would have been required, it follows, that, in this case, service of an indorsed copy of the re-amended bill was indispensable; and, if service of an indorsed copy was indispensable, then the service of a plain copy on the 5th of August was a nullity.

Then, service of the plain copy on the 5th of August being a nullity, service of the indorsed copy on the 30th of August was effectual; for no time is limited for the service of an amended bill (*a*); nor is the practice consistent with the existence of any such limitation: *Cooke v. Davies* (*b*).

In any case, the Defendant is bound to answer the interrogatories which have been filed. Even if the Court

(*a*) See Consolidated Orders, Ord. ix. (*b*) Turn. & Russ. 309.

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 BARRY
 v.
 CROSKY.
 —
Argument.

should be of opinion, that service of the indorsed copy after service of a plain copy was irregular, still the re-amendment, being before any voluntary answer had been put in, showed an intention to require an answer to the original interrogatories. It cannot be, that, where an amendment is merely verbal, e. g. by the insertion of a name, or, as here, of a date, fresh interrogatories, consisting of several hundred folios, must be served, or the Plaintiff put to the unnecessary expense of making an application to the Court to have service of the original interrogatories treated as service of interrogatories to the amended bill.

Judgment.
 —

VICE-CHANCELLOR SIR W. PAGE WOOD, without hearing a reply:—

I think, Mr. *Braithwaite* is correct in the statement which I read from his book on the “Record and Writ Practice of the Court;” and that, where a Plaintiff requires an answer to an amended or a re-amended bill, he must serve the Defendant with a copy of such bill, indorsed in the form or to the effect set out in the schedule to the Act 15 & 16 Vict. c. 86, requiring him to enter an appearance within eight days. The 8th section of the Act provides, that, upon the amendment of any bill, the provisions contained in the former part of the Act with respect to filing, and serving, and delivering printed copies thereof, shall, so far as may be, extend and be applicable to the bill as amended. And, looking to the provisions contained in the former part of the Act, I find it enacted in the 3rd section, that, in lieu of serving the Defendant to a bill with a writ of subpoena to appear to and answer the same, in the mode and according to the practice then adopted, the Defendant shall be served with a printed bill, with an indorsement thereon in the form or to the effect set out in the schedule to the Act. As, therefore, under the old

practice, a subpoena would have been required to compel an answer to an amended bill, it follows, from the 8th section of the Act, that, under the new practice, an indorsed copy is necessary in order to compel such answer.

1861.
BARRY
v.
CROSEY.
Judgment.

Mr. *Simpson* endeavoured to meet that by arguing, that, if, in the present case, service of an indorsed copy of the re-amended bill was indispensable, then the service of a plain copy is to be treated as a nullity; and, if so, then the subsequent service of an indorsed copy was effectual. But I am clear, that the service of the plain copy was in effect an intimation to the Defendant, that no answer was required of him. It is admitted, that, if a Plaintiff does not require an answer to an amended bill, he need not serve the Defendant with an indorsed copy. If, therefore, a Defendant is not served with an indorsed copy—if he is served with a plain copy of an amended bill—he has a right to presume, that no answer is required. Here, the Defendant, being served with a plain copy of the re-amended bill on the 5th of August, had a right to assume, that he was not required to put in an answer to it. That service amounted in effect to an intimation, that no answer was required; and, if so, it cannot be treated as a nullity.

The subsequent service, therefore, on the 30th of August, of an indorsed copy was clearly irregular, and the Defendant is entitled to have it set aside.

The Plaintiff's proper course, instead of resorting to a subsequent service, would have been, to apply to the Court for leave to correct the error into which he had fallen in serving a plain copy of the bill; which would have been granted at once, upon payment of costs of the application: and I cannot but express my regret that this course was not taken. At the present day, trifling matters of this kind are never allowed to stand in the way of the due prosecution of a cause to a final decision upon the matter in dispute, but errors in points of practice are always allowed to be

1861.
 BARRY
 v.
 CROSKY.
 Judgment.

corrected, where it can be done without injustice to any of the parties—subject, of course, to the party who has made the mistake paying the costs of the application.

Minute of
 Order.

SET aside the second service of the re-amended bill, and the filing and service of the interrogatories; Plaintiff to pay costs occasioned by such service.

Nov. 25th.
 Demurrer—
 Record and
 Writ Clerk—
 Order to strike
 Defendant's
 Name out of
 Record of Bill.

BARRY v. CROSKY (No. 3).

Where the demurrer of one of several Defendants has been allowed absolutely, the bill being retained against the rest, the former is entitled, upon motion for that purpose, to an order directing the Clerk of Records and Writs to strike his name out of the record of the bill.

THIS was a suit against several Defendants, four of whom demurred. The demurrer of one, the *Buenos Ayres and San Fernando Railway Company*, was allowed absolutely; those of the other demurring parties were allowed, but with leave for the Plaintiff to amend his bill (a).

Sir *H. Cairns* and Mr. *W. Morris*, now moved, that the Record and Writ Clerk, in whose division this cause was, might be directed to strike the name of the Defendants, the company, out of the record of the bill;—contending, that the company were or might be prejudiced, by being supposed to be Defendants to a suit of this description.

Mr. *C. T. Simpson*, for the Plaintiff, explained that the company's name had been retained on the record to enable the Plaintiff to prosecute an appeal he had in contemplation against the order of the 17th of July allowing the demurrer.

(a) See the Report *suprà*, pp. 1—31.

The VICE-CHANCELLOR held, that the company were entitled, as of right, to have their name struck out of the record of the bill.

1861.
BARRY
v.
CROSKY.
Judgment.

ORDER in terms of the notice of motion, with costs.

Minute of
Order.

BELLAMY v. BRICKENDEN.

THIS was a redemption suit against a mortgagee in possession. The mortgagee claimed to be allowed in account the amounts paid by him for premiums on a policy of fire insurance effected by himself. The mortgage-deed contained no provisions with respect to fire insurance.

A policy effected by the mortgagor on his own life was delivered as a further security to a trustee for the mortgagee; and the mortgagee claimed to be allowed interest, upon the amount of the premiums paid by the trustee upon the said policy, and on all subsequent payments.

The decree, dated the 29th of January, 1859, was a common redemption decree, including an account of these premiums among the mortgagee's claims, but was silent as to interest thereon, except so far as this might be deemed to be included in the general directions for redemption on payment of the principal, interest, and costs, which should be found due.

found due for principal, interest, and costs:—"Held, that the mortgagee was entitled to charge interest, at £4 per cent., on the premiums so paid by him or his trustee, within six years before the certificate.

June 27th.
Mortgagor and
Mortgagee—
Fire Policy—
Life Policy—
Interest.

A mortgagee in possession is not entitled, in the absence of express contract, to charge in account premiums on a fire policy on the mortgaged property.

Where a decree in a foreclosure and redemption suit directed an account of principal, interest, and costs, including premiums paid on a life policy, which had been delivered to a trustee for the mortgagee as a further security, and proceeded in the common form, "on the Plaintiff paying what shall be

1861.

BELLAMY

v.

BRICKENDEN.

Mr. H. F. Bristowe, for the Plaintiff.

Mr. Eddis, for the Defendants.

Argument.

[The following cases were cited:—*Dobson v. Land* (a),
Baldwyn v. Banister (b).]

Judgment.

The VICE-CHANCELLOR said, that he considered the question as to the fire premiums settled by *Dobson v. Land*. A mortgagee, in the absence of special contract, is not entitled to charge, in account, the premiums which he may have paid upon an insurance of the property against fire.

With respect to the life premiums, the mortgagee, but for the decree, would be clearly entitled to interest thereon at the rate of £4 per cent., but only for a period of six years. The decree allowed the premiums, and contained nothing to preclude a charge of interest thereon. It left it open for the mortgagee to claim all such interest as he was entitled to, that is, on all premiums paid within six years before the certificate.

(a) 8 Hare, 216.

(b) 3 P. Wms. 251, n.

7 Cl 2053

CASES IN CHANCERY.

139

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14th 290

34, 13th 180
11 14 1853/1DENT v. TURPIN.
TUCKER v. TURPIN.

THE case of *Dent v. Turpin* came on upon a demurrer and answer.

The bill was filed by the widow of *E. J. Dent*, and stated as follows:—The said *E. J. Dent* carried on the business of a watchmaker, in *London*, having three places of business: one in the *Strand*, another in *Cockspur Street*, and the third at the *Royal Exchange*.

E. J. Dent died in 1853, having bequeathed his shop, and the stock and goodwill of his business in the *Strand*, and also the shop, stock, and goodwill of his business at the *Royal Exchange*, to his step-son *Frederick Rippon*, whom he desired to take the name of *Dent*; and his shop, stock, and goodwill of the business at *Cockspur Street*, to his step-son *Richard Dent*, formerly *Rippon*.

Frederick Rippon took the name of *Dent*, and carried on the business in the *Strand* and at the *Royal Exchange* till his death, in April, 1860, intestate; and, on the 1st of January, 1861, administration was granted to the Plaintiff, who carried on the business as administrator.

Dent carried on the business at *Cockspur Street* till his death, in April, 1860, intestate; and administration was granted to the Plaintiff, who had since carried on the business as administrator.

profits as the Plaintiff should be entitled to.

for any part of the relief prayed, that is sufficient to sustain the bill, and it is no answer to such demurrer to say, that that part of the bill is not proper for the hearing.

1861.

April 19th,
20th & 22nd.Injunction—
Trade Mark—
Parties—
Demurrer.

The Plaintiff and another person, who carried on distinct trades at different places of business, had derived, from a common predecessor in their respective businesses, the right to use the name of *Dent* as a trade mark. The Defendants having infringed this right:—Held, on demurrer, that the Plaintiff, without averring special damage, might sue alone for an injunction, and for the delivery-up of the articles so marked to have the name erased.

Held, also, that he might sue alone for an account of profits made by the Defendant out of articles so marked, and for payment to the Plaintiff of such part of such

1861.
DENT
v.
TURPIN:
TUCKER
v.
TURPIN.
Statement.

The testator, *E. J. Dent*, had been in the habit of labelling his watches, "*Dent, London.*" The Defendants *H. W. Turpin* and *G. H. Turpin*, were watchmakers, in *Banner Street*, carrying on business in copartnership, under the firm of *Turpin, Brothers*, and the Defendant *Mosenthal* was an export merchant. The firm of *Turpin, Brothers*, manufactured, and *Mosenthal* exported, watches, labelled "*Dent, London,*" without the sanction of the Plaintiff, or of the administratrix of *Richard Dent*.

The bill prayed as follows :—

1. That an account might be taken of all watches manufactured by the Defendants, marked with the name of *Dent*.

2. That an account might be taken of the profits received by the Defendants, respectively, which had arisen from the sale of watches so manufactured and marked.

3. That the Defendants might be decreed to pay to the Plaintiff so much and such part of the said profits as it should appear the Plaintiff was entitled to, under the circumstances stated.

The bill also prayed, for an injunction, and that all the watches in the possession of the Defendants, marked with the name of *Dent*, might be delivered up to be destroyed, or to have the name erased.

The Defendants *H. W.* and *G. H. Turpin* put in a demurrer to so much of the bill as sought an account of profits and an injunction, or asked for the delivery-up of watches in their possession marked with the name of *Dent*, for want of equity, and also for want of parties,

by reason of the administratrix of *Richard Dent* not being a party.

1861.
DENT
v.
TURPIN:
TUCKER
v.
TURPIN.
Statement.

Tucker v. Turpin was a similar bill, filed by the administratrix of *Richard Dent*, to which the Plaintiff in the first suit was not made a party. This also was demurred to, for want of equity and want of parties.

Mr. Rolt, Q.C., and Mr. Elderton, for the demurrer in the first suit:—

Argument. !

The alleged injury is to one of the firms, successors to *E. J. Dent*, as much as to the other; and an action for damages would have to be brought in the joint names. At any rate, both must be parties to a suit for an injunction and account, or we may be liable to answer the results of two different and conflicting accounts in two distinct suits. There is no allegation, that the executor of *E. J. Dent* ever assented to the bequest to the Plaintiff; nor is there any allegation that we have not been licensed by the other firm to use the name of *Dent*.

At law, the authorities are clear, that, where a single act causes several injuries, the action must be joint.

In *Weller v. Baker* (a), an interloper having taken water at a medicinal spring, which the regular dippers were alone entitled to do, an action was brought by all the dippers; and it was held, that this was right, because, the injury being to a common right, they must join, though the loss to each was only the gratuity which she might individually have received from the persons supplied by the interloper. In

(a) 2 Wils. 414, 422.

1861.
 DENT
 v.
 TURPIN:
 TUCKER
 v.
 TURPIN.
 Argument.

Coryton v. Lithebye (a), two millowners joined in a declaration, averring, that the Defendant was bound to grind at one of their mills and had ground elsewhere; and it was held, that they rightly joined in the action, for, otherwise, the damages would be twice recovered, if they brought several actions. *Hill v. Tucker* (b) is to the like effect.

From these authorities it follows, that, where the legal right invaded is joint, the auxiliary equity in aid of the legal right can, in like manner, only be granted in a suit to which both the injured persons are parties. Then an account of damage cannot be taken, except in the presence of both firms; otherwise, in one suit, the whole damage might be attributed to the one Plaintiff, and in the other suit to the other—so that we should have to account twice over for the same injury.

[They also cited, *Croft v. Day* (c), *Farina v. Silverlock* (d), *Churton v. Douglas* (e), *Knott v. Morgan* (f), *Perry v. Truefitt* (g), *Collins Company v. Brown* (h), *Collins Company v. Cowen* (i).]

Hine v. Lart (k) is distinguishable, on the ground, that, there, the Plaintiff was the only person who had used the mark, the right to which was in question. On these grounds, it would not be enough even to make the owner of the other business a Defendant. She must be a co-Plaintiff.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think, there are sufficient grounds for overruling the demurrer for want of equity. The Plaintiff, suing alone,

(a) 2 Wms. Sand. 115.

(b) 1 Taunt. 7.

(c) 7 Beav. 84.

(d) 2 Kay & J. 650.

(e) Johns. 174.

(f) 2 Keen, 213.

(g) 6 Beav. 66.

(h) 3 Kay & J. 423.

(i) Id. 428.

(k) 10 Jur. 106.

has a clear right to an injunction to prevent a wrong being done to her. The case of the dippers, cited from *Wilson's Reports*, was more the case of an action, by one of a large number of persons, to recover profits which ought to have gone to the whole body, but which had been intercepted by interlopers. Then, in the mill case, what was held was, not that the two millowners *must*, but that they *might*, bring a joint action for an injury which affected both their mills. If this bill was confined to the prayer for account, the argument might possibly apply, for I see, that very great difficulty may arise in taking any account that may be asked for. But the question now is, whether or not the Plaintiff would be entitled, at the hearing, to restrain the use of this trade mark, in consequence of the injury to her, of having inferior articles palmed upon the public as of the manufacture of a firm entitled to use the name of *Dent*—whether this is not a wrong which the Court would restrain, by injunction, irrespectively of any question as to the amount of profits made by these means. It was contended, that there was no distinct averment of specific damage; but I think, it is quite enough to aver, as the bill does, that these articles were manufactured and marked with the trade mark in question, without the consent of the Plaintiff or of the other person entitled to use the name of *Dent*.

1861.
DENT
v.
TURPIN:
TUCKER
v.
TURPIN.
Judgment.

There is an authority at law to the effect, that an averment of special damage is not necessary under such circumstances. I refer to *Blofeld v. Payne (a)*. There the declaration stated, that the Plaintiff was the inventor of metallic hones, and used a wrapper, denoting them to be his, and that the Defendants used a wrapper similar to the Plaintiff's, whereby the Plaintiff's goods were depreciated in value. It appeared, that the Defendants had used the

(a) 4 B. & Ad. 410.

• 1861.
 DBNT
 v.
 TURPIN:
 TUCKER
 v.
 TURPIN.
 Judgment.

Plaintiff's wrapper, but no specific damage was proved. The question left to the jury was, whether the Defendants' hones were inferior; but, even if not so, the learned judge said, that the Plaintiff was entitled to some damages, as his right had been invaded. The jury found for the Plaintiff, with a farthing damages, thinking the Defendant's hones not inferior. Leave was given to enter a nonsuit, and, on the motion pursuant thereto, it was held, that enough was proved to entitle the Plaintiff to recover. So *Taunton, J.*, says in *Marzetti v. Williams (a)*, "There are many instances where a wrong, by which the right of a party may be injured, is a good cause of action, although no actual damage be sustained." If, therefore, the facts are established, as, for the purposes of the demurrer, I must assume them to be, that the Plaintiff and another have the right to use a distinct trade mark, and that the Defendants have fraudulently used this mark without the consent of either of the persons entitled, I must hold, that each of the persons entitled to the mark has a right of action for the fraud, without averring specific damage, and a right which this Court would struggle to protect, irrespectively of any such damage, by granting an injunction, even though the other relief asked for might be refused.

Clearly the Plaintiff would not be obliged to make the owner of the other business a party, for the purpose of obtaining an injunction, nor yet for this other part of the relief which is asked, viz. to have the mark erased from every watch manufactured by the Defendants. All that relief might well be obtained without joining the other firm.

With respect to the other ground of demurrer, *Hine v. Lart* goes a long way. The counter authorities

(a) 1 B. & Ad. 426.

cited only amount to this, that there may be a question of parties, either here or at law. The point is, whether, by having asked for an account, the Plaintiff has made the owner of the other business a necessary party. As to that I will hear the Plaintiff's counsel.

1861.
DENT
v.
TURPIN:
TUCKER
v.
TURPIN.
Judgment.

Mr. Giffard, Q.C., and Mr. Walford, for the Plaintiff:—

Argument.

It is enough that we show ourselves entitled to some relief. The want of parties, even supposing them to be necessary for part of the relief, is not a sufficient ground for a demurrer to the other parts of the bill. If we had brought the other party here, she could have demurred. It is said, that the damage must be apportioned in this suit between one firm and the other. But, if the Defendants deny our right to an account, it is for them to show that the whole damage was to the other firm, or to point out how much was to them and how much to us. They cannot call on us to relieve them from the embarrassment which is the result of their fraud.

The cases at law do not apply. In the mill case, the only decision was that the Plaintiffs might join; otherwise actions would be multiplied. There is no such decision as this, that, where several persons are libelled or assaulted, all must join. In the note to that case (a) the authorities are collected, and amount only to this, that the remedy may be joint where there is a joint right and a joint injury, so that the damages would accrue to the two jointly. Here the injury is not joint, first, because the interests are severable; and, secondly, because this is not a bill seeking relief for the invasion of property, but for a fraudulent representation; and, in the note before cited, it

(a) 2 Wms. Saund. 117.

1881.
 DENT
 v.
 TURPIN:
 TUCKER
 v.
 TURPIN.
 —
Argument.

is said, that, if a man impute a crime to two, there can be no joinder, nor in any case of slander except of partners in their business, and then only so far as relates to the joint damage.

Lupton v. White (a) lays down the principle applicable in cases of fraud. If, by committing a fraud, the Defendant has put a difficulty in the Plaintiff's way, it is his own fault, and he must suffer. The Defendants must get over any difficulties in the adjustment of the account. Then we may, if so minded, at the hearing, abandon that part of the relief which is said to require the presence of other parties.

[The VICE-CHANCELLOR.—If other parties are necessary for any part of the relief asked, that is enough to support a demurrer for want of parties.]

We could not join them as Plaintiffs without their consent; and, if we made them Defendants, they might demur. In such a suit they could get no relief, and must have an independent suit of their own.

As to the cases, the rule in equity is not the same as it is said to be at law: *Millington v. Fox* (b), *Dixon v. Fawcus* (c).

Then the 51st section of the Chancery Improvement Act (d) relieves us of the difficulty, supposing that it would have existed under the old practice.

Mr. Rolt, in reply:—

There is no authority for the proposition, that the possibility of waiving part of the relief is an answer to a demurrer for want of parties.

(a) 15 Ves. 432.

(b) 3 My. & Cr. 338.

(c) 9 W. R. 414.

(d) 15 & 16 Vict. c. 86.

Then the analogies insisted on, of a libel or assault on several persons, do not apply, because the right claimed here devolved from a common ancestor on the Plaintiff and the testator's other successors. The wrong is to the entire right. It must be assessed as to the whole and then apportioned, which cannot be done in the absence of one of the parties.

1861.
DENT
v.
TURPIN:
TUCKER
v.
TURPIN.
Argument.

Lastly, the principle derived from *Lupton v. White* is foreign to this case. That was only a decision, that a person who mixes another's property with his own must bear the consequences. But, here, the mixing of the rights is not our act at all. If one of the two firms had licensed me, there would have been no wrong. The real question is, whether it is a proper case for two suits, and it clearly is not.

[It was arranged, that the question in *Tucker v. Turpin* should be left to the judgment of the Court, without further argument.]

VICE-CHANCELLOR SIR W. PAGE WOOD:—

April 22nd.
Judgment.

The question raised in these suits is rather singular. The Plaintiff in each suit seeks redress for the alleged piracy of a trade mark, the right to use which is enjoyed independently by both Plaintiffs, who have derived their title from a common ancestor. It is rather to be regretted that they did not distinguish their trade marks, but both firms continued to use the old trade mark, as they had an undoubted right to do. Upon the demurrers, the Defendants must be regarded as wilful invaders of these rights. I have no doubt, as I have before said, that each Plaintiff has an equity, in respect of the wrong done to himself, to restrain the use of the trade mark by the Defendants, and to have it erased from the articles on which it has been wrongfully impressed, and this even

1861.
 DENT
 v.
 TURPIN :
 TUCKER
 v.
 TURPIN.
 Judgment.

without proof of special damage. That equity, I think, could clearly be sustained by either Plaintiff in a suit to which the other was not a party; and the only difficulty I felt related to the account which is prayed by each bill. Even this vanishes when the frame of the bill is considered. The second and third paragraphs of the prayer in each case, when taken together, only ask for an account with a view to the individual benefit of the Plaintiff, the payment asked for being limited to such portion of the Defendant's profits, as the Plaintiff should appear to be entitled to. It may be very difficult to ascertain this proportion, but there is no defect of parties, because each Plaintiff asks only for her own share.

There is a valuable note in *Williams's Saunders* to the case of *Coryton v. Lithebye*, which throws much light upon the question. The authorities are there collected, and this principle is clearly to be deduced from them, that, if a wrong is done, which affects two persons having a joint interest in the right which is invaded and in the damages to be recovered, there both must join in an action for damages. But, if two persons are injured in several capacities by the same wrongful act, there each may, and in one case—that of a crime being imputed to two persons—it was laid down that each *must*, sue separately. The learned editor mentions this clear illustration of the principle:—Two persons who have suffered from a robbery bring an action against the hundred. If they are partners and the robbery was of joint property, they should sue jointly; but, if the property did not belong to both, each must sue alone. It appears to me, on principle, that a person who is a mere wrongdoer cannot call in aid any circumstance of this kind. The wrong may, perhaps, be said to be done to a common right; but then an account, such as is prayed by each of these Plaintiffs, relates to the damage suffered by that Plaintiff individually in which the other cannot possibly be interested. It has been compared to the case of

slandering two partners in their trade. The wrong there may, to a certain extent, be considered as an injury to a common right, so as to entitle the partners to bring a joint action. But the two persons are not interested in common in all the consequences of the injury, for each suffers, not only the joint but special damage; and, if an account can be had, each is entitled to it separately, because neither can take compensation for that part of the loss, which the other has personally sustained.

It was argued, in support of the demurrer, that there can only be one action where there is common damage; but even in the mill case, which was relied on in favour of this view, the decision was not, that two Plaintiffs in such circumstances must join, but only that they may; and the reason given for this is, that otherwise there would be separate assessments of damage; and the Plaintiffs were entitled to join to have the damages assessed, once for all, in a single action. But it is possible that one of two injured persons might not care about the remedy of an injunction, for which this Court is especially applied to; and the other ought not, on that account, to be deprived of all redress. It is extremely difficult to say, that, because there is in some sense a common wrong done to a common right, therefore, it is necessary that a suit should be brought by both parties together.

As against the wrong-doer, it may fairly be urged, that the mischief is of his own creation. He has no right to complain of the consequences of any technical difficulty, which may arise from his own wrongful act; and, though it may be a hardship on him to be involved in more than one suit, still, it is his own fault; and I think, I am bound to overrule the demurrers. It is possible, that one suit would have been sufficient; but I think, I must nevertheless follow the usual course, and make the Defendants, as the failing parties, pay the costs.

1861.
DENT
v.
TURPIN:
TUCKER
v.
TURPIN.
Judgment.

1861.

Dec. 4th.

Park—Reclaimed Deer.

Deer in a park, when reclaimed, become personal chattels and cease to be parcel of the inheritance.

Therefore, in a suit by incumbrancers of a tenant for life of a deer park and other property, an application by remaindermen to prevent the receiver from letting the park, except as a deer park and with proper covenants for preserving the deer, was refused, on evidence that the deer were reclaimed.

Consideration of circumstances, which amount to a reclaiming of deer for this purpose.

FORD v. TYNTE.

THIS was a suit by an incumbrancer on the life estate of the Defendant, *C. J. K. Tynte*. Part of the property consisted of a lawful deer park, granted by the Crown in the reign of *James I.* and attached to a mansion house at *Halswell*. The receiver appointed in the cause had proposed to let the park.

The property was vested, after the death of the tenant for life, in the Defendant, *Charles Tynte*, for life, with remainder to his infant son in tail. These remaindermen took out a summons to obtain a direction, that the deer park should not be let otherwise than as a deer park and under covenants providing for the maintaining of the park and the herd of deer; and that, in the mean time, the receiver might be directed to keep up and maintain the same as a park, and to keep up the herd of deer therein. This summons was adjourned into court. By the evidence it appeared, that the park had always been kept up as a park since the original grant. The park was 114 acres in extent, and contained about 500 deer. The system of management was this:—In June of each year the does were watched, and the fawns, when dropped, were marked in the ears, in order to preserve a record of their age. From two to four deer were taken every January and put into a stable to fatten, and, when fat, were shot there. In the winter the deer were fed in the open park with hay and beans, and fattened in the summer with the grass of the park, and those fit for killing were shot there. The park had never been cropped, or the produce thereof let or sold or in any way turned to profit, but it had always been enjoyed as an appendage to the mansion.

Mr. *Giffard*, Q.C., and Mr. *Kingdom*, for the motion :—

Deer, in a lawful park, are attached to the inheritance : *Case of Swans* (a), 2 *Blackst.* Comm. (b), *Davies v. Powell* (c), *Liford's case* (d). A lawful park can only be created, as this was, by Royal grant, and, if once disparked, cannot be restored without a fresh grant. The conditions of a lawful park are, vert, venison, and inclosure, and, if once the deer are removed, it is disparked and all the privileges are gone : *Monopolies case* (e), 3 *Cruise*, Dig. (f), 2 *Inst.* (g). The remaindermen, therefore, have a right to have the park maintained ; and it is waste in a tenant for life to do any thing to sever the deer from the inheritance.

1861.
FORD
v.
TYNTE.
Argument.

The authority which will be relied on on the other side is *Morgan v. Abergavenny* (h), which is to the effect, that deer, when they have been reclaimed and domesticated, become personal chattels and pass to the executor. But it would be an extraordinary thing if the tenant for life, by committing an act of waste, which the reclamation of the deer would clearly be, could thereby acquire a title to property which, but for his own wrong, would have remained attached to the inheritance. It is strange, that this point does not seem to have been taken in the argument of that case. In Mr. Justice *Willes*' edition of *Smith's Leading Cases* (i) the authority of this case is questioned ; and, at any rate, this Court will not allow a tenant for life to take advantage of his own wrongful act.

Further, the evidence here does not prove, that the deer have been reclaimed. It is true, they are fed with hay in the winter ; but it can scarcely be thought, that throwing down a truss of hay in the park can have the effect of

(a) 7 Rep. 15 b, 17 b.

(b) Page 428.

(c) *Willes*, 46.

(d) 11 Rep. 46 b, 50 b.

(e) 11 Rep. 81 b, 87 a.

(f) Page 247.

(g) Page 109.

(h) 8 C. B. 768.

(i) 4th ed., vol. 1, p. 331.

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transferring the property to the tenant for life ; and there is no buying and selling for profit, as there seems to have been in *Morgan v. Abergavenny*.

[They also cited *Co. Litt. (a)*, *Rowland v. Morgan (b)*, *Attorney-General v. Duke of Marlborough (c)*, *Turner v. Wright (d)*.]

Mr. *Rolt*, Q. C., and Mr. *Southgate*, for the Plaintiff, were not called upon.

Mr. *Briggs* appeared for the tenant for life, and Mr. *Beavan* for the first incumbrancer.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I do not think it is possible to get over the case of *Morgan v. Abergavenny*, which is precisely in point; indeed, if anything, it was rather a stronger case than this. The area of the park was much more considerable than in the present case, and the evidence of the reclamation of the deer was to this effect:—The deer, ordinarily, had the range of the old park, and were attended by keepers and fed in the winter. The deer were watched in the falling season, and the fawns marked. At times, certain of the deer were selected from the herd and caught, with the assistance of muzzled dogs, and turned into an inclosure or into pens to fatten. The ordinary mode of killing was by shooting; and some of the deer are described as being very tame, coming close to the keepers when called at feeding times. Witnesses were also called to prove, that, of late years, deer had been commonly bought and sold for profit, like sheep and other animals.

Here the deer seem, if anything, tamer still; for the

(a) 233. a.
 (b) 2 Ph. 764.

(c) 3 Madd. 498.
 (d) 8 W. R. 675.

keeper is apparently able to take such as he intends to lock up, without using any special means. It was suggested, as a distinction between the two cases, that, in *Morgan v. Abergavenny*, the deer were bought and sold for profit; but I do not think, that is the meaning of the evidence as reported. All that it goes to show is, that the purchase and sale of deer for profit was a common practice, not that it was the practice on that estate. In its facts, therefore, the authority is on all fours with this; and I find Chief Justice *Wilde* asking what would be a reclaiming of deer in a park, except what was done there; and, in delivering the judgment of the Court, Mr. Justice *Maule*, after stating the substance of the evidence and the finding of the jury that the deer were reclaimed, said, not only that the question was rightly left to the jury, but that there were no sufficient grounds for saying that they had come to a wrong conclusion.

I must, therefore, hold, that these deer have been reclaimed, and are no longer *feræ naturæ*. It was contended, indeed, that, in the argument in *Morgan v. Abergavenny*, the fact, that the reclamation of the deer by a tenant for life would be an act of waste, was overlooked. But, even if it would be so, I find the point clearly referred to in the report of Serjeant *Talfourd's* argument, where it is said, "If venison be indispensable to the subsistence of the franchise, it would be strange if it should be held to be destroyed unless each successive possessor thought fit to bequeath the deer to the person next entitled to the inheritance;" and, indeed, the argument answers itself. To reclaim the deer is an act of waste, precisely because it makes them no longer venison in a park but chattels, like any other domesticated animals. But it is a fallacy to say, that the tenant for life acquires the property by such an act of waste. Instead of adding to his property, this act causes the for-

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Judgment.

feiture of his interest ; and the remedy in such a case would be to insist upon the forfeiture, if the fact could be established. It does not appear (nor would it be material for the present purpose if it did), that the reclamation of the deer was the act of the tenant for life. What is proved is, that the deer are, in fact, completely reclaimed ; and, even if this had been done by the tenant for life, it could not be said, that this Court was allowing him to take the benefit of his own wrong, because, in reality, any benefit accruing to him would be due entirely to the neglect of the parties interested, in not proceeding on the forfeiture which they say has taken place.

The case, therefore, comes to this :—On the authority of *Morgan v. Abergavenny*, I must hold, that these deer are tame, and no longer part of the inheritance. That being so, why am I to prevent the receiver from letting the land without maintaining the herd ? The only possible question between these parties is, as to the steps which the remaindermen may hereafter be entitled to take with respect to any acts done to reclaim the deer. That question has nothing to do with the application to let the land, the deer being, in fact, reclaimed ; and, this being so, I cannot interfere to prevent the receiver from letting in the best way he can.

The motion will, therefore, be refused, as to the Plaintiffs, with costs. The first incumbrancer's costs must be added to his security.

1860.

March 29th.

BENNETT v. LYTTON:
RE SANFORD'S TRUST.

6 Bk 475
Administration
—Executors—
Indemnity by
—Decree—
Retaining
Assets—
22 & 23 Vict.
c. 35, s. 27.

IN this case, a creditor's suit, *Darville v. Lytton*, had been prosecuted, in which the accounts were taken and all the present debts paid. *Bennett v. Lytton* was a subsequent legatee's suit in respect of the same estate, in which a decree was made, and the accounts in the creditor's suit were ordered to be adopted. These proceedings took place before the passing of 22 & 23 Vict. c. 35.

Executors bringing facts plainly before the Court and distributing the assets under its direction are absolutely protected against any future claims; and the only remedy of a creditor, on covenant or otherwise, is against the legatees.

A petition was now presented in the legatee's suit, and under Lord *St. Leonards'* Act, for payment of the legacies. The executors claimed to have a portion of the assets retained, to indemnify them against the covenants in a lease which formed part of the assets and had been assigned to a purchaser; and it appeared, in evidence, that the lease was held at a ground rent of £40, that the property was let at a rent of £400, and that no present liability existed, nor any future liability in respect of any fixed sum covenanted to be laid out on the premises.

Where part of the estate had consisted of leaseholds held at a profit rent—the estate ordered to be distributed without retaining assets to indemnify the executors against liability on the covenants.

Mr. *Ellis*, for the Petitioners:—

The executors will be perfectly protected by the order of the Court, without retaining any assets: *Dean v. Allen* (a), *Waller v. Barrett* (b).

Whether the statute 22 & 23 Vict. c. 35, is retrospective throughout—*Quere*.

The 27th section of Lord *St. Leonards'* Act also protects the executors, if, as we submit, the Act is retrospective. By that section executors are indemnified,

(a) 20 Beav. 1.

(b) 24 Beav. 413.

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and are at liberty to distribute the residuary estate, upon setting apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted by the lessee to be laid out on the property, and upon assigning the lease to a purchaser. Here, there is no such covenant to lay out money, and the clause is an absolute indemnity.

In *Dodson v. Samuel* (a), Vice-Chancellor *Kindersley* considered, that this section was not retrospective; but that was an application to withdraw assets which had been previously set apart, and is, therefore, distinguishable. Other clauses of the Act have been held retrospective in *Page v. Bennett* (b) and *Re Miles* (c).

[The VICE-CHANCELLOR.—It appears, that Vice-Chancellor *Kindersley* decided *Dodson v. Samuel* as he did, because he thought himself bound by the principle of the decision of the Court of Exchequer Chamber in *Jackson v. Woolley* (d).]

Mr. *Boyle*, for a legatee, cited *March v. Russell* (e).

Mr. *Freeman* for another legatee.

Mr. *Waller*, for the executors.—We only desire to be protected, and do not otherwise oppose the petition.

Judgment. VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think, the doctrine laid down by the Master of the Rolls so reasonable, and so consistent with justice, that I

(a) 6 Jur., N. S., 137.

(b) 8 W. R. 300.

(c) *Id.* 54.

(d) 8 Ell. & B. 784.

(e) 3 My. & Cr. 31.

am quite disposed to adopt the rule; and I think, I have acted on the same principle myself, in a case where there were covenants of the testator to secure the payment of certain annuities, and also considerable liabilities in respect of rents. In that case, in chambers, I followed the authority of the Master of the Rolls, and distributed the whole estate. Where executors bring all the facts plainly before the Court, and distribute the assets under its direction, they will be protected from any future suit. The only possible question is, whether any person, not a party to the suit, might not be in a position to say, that the administration suit was *res inter alios acta*; but this difficulty is removed by the consideration, that, in the administration of assets on behalf of creditors, the Court has already assumed the jurisdiction of restraining any creditor who will not make his proceedings subservient to the directions of the Court. Founding myself, therefore, upon this established principle, it will be necessary to have the petition amended, so that the order may be made not in the legatee's but in the creditor's suit, in which I am distributing the remainder of these assets. There is never any necessity for retaining assets in order to protect the executors, they being fully indemnified by the direction of the Court; and even with regard to the interests of creditors in a case like this, where the Court has before it the covenant for rent with no statement of any special liability existing upon it at this moment, there is no ground for retaining any portion of the assets.

It is not an entirely satisfactory reason for taking such a course, to say, that the annual value of the property is much greater than the rent payable under the covenant, because the houses might be burned down at any time. It is possible, indeed, that the burden, which would arise in that event, might be regarded as a mere contingent liability, which is not allowed to impede the administra-

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 —
Judgment.

tion of assets, even at law ; and, supposing the question to be reduced to the simple liability for rent, it would be certainly something to say, that, if the executors were liable, they would have an ample indemnity. But I think it better to rest upon the broad principle enunciated by the Master of the Rolls on several occasions ; and, so long as that rule remains unaltered, I think it so convenient and advantageous, even for creditors themselves, in the administration of assets, that I shall most willingly adopt it.

As to the other point upon Lord *St. Leonards'* Act, I believe, there is every probability of the doubt being removed, by legislation (a). At the same time I may say, that I am surprised that any difficulty should have been felt, my own impression being quite clear, that the Act is throughout retrospective. However, I prefer to rest my decision on the broader ground, that executors who act under the direction of the Court will be protected ; and that those who may afterwards dispute the propriety of the application of the assets must proceed against the legatees. I am, therefore, of opinion, that it is not necessary to set apart any portion of the estate against the liabilities upon the covenants.

(a) The stat. 23 & 24 Vict. c. 38, passed shortly after the date of this judgment, enacted (sect. 12) that the 32nd section of the 22 & 23 Vict. c. 35,

should operate retrospectively. There appears to have been no similar enactment with reference to the other sections.

4 Dec 31 1861
L109 B 252

66h 129
L109 B 252

1861.
Nov. 12th.

RALLI v. THE UNIVERSAL MARINE INSURANCE COMPANY AND OTHERS.

*Shipping—
Maritime In-
surance—Sale
of Cargo afloat
—"Short In-
dorsement" of
Policy.*

ON the 9th of January, 1861, the Plaintiffs, the then owners of a cargo of 3,450 chetwerts of wheat shipped on board the ship *Astræa*, then lying at *Odessa*,—effected through their broker, the Defendant *Ionides*, two policies of insurance on the cargo, one with *Lloyd's* for £4,000, and another with the Defendants, the *Universal Marine Insurance Company*, for £3,000.

A contract for the sale of a specific cargo afloat, "including freight and insurance," stipulating for "payment in exchange for bills of lading and policies of insurance, effected with approved underwriters, but for whose solvency sellers are not to be responsible," (no specific reference being made to any existing policy), does not operate as an assignment of, or necessarily entitle the purchaser to, the specific policies effected on the cargo at the port of shipment (a).

The £3,000 policy was expressed to be "upon 3,450 chetwerts wheat valued at £7,000 including £200 on advances at and from *Odessa* to a port or ports of discharge in the United Kingdom, with leave to call for orders; including all risk of craft; warranted free of capture and seizure, and the consequences of any attempt thereat:" and the Company thereby agreed that the insurance should commence upon the ship at and from as above, and should continue until she had moored at anchor in good safety at her place of destination, and for such period afterwards not exceeding twenty-four hours from such mooring; and upon the freight and goods or merchandise on board thereof from the loading of the said goods or merchandise on board the said ship at as above, and until the said goods or merchandise should be discharged and safely landed at as above.

Therefore, where, under such a contract, the cargo

having fallen in value since the shipment, the vendor short indorsed such a policy for an amount sufficient, in the events which happened, to indemnify the purchaser against the loss of the ship, reserving to himself the balance, which the underwriters paid into court:—*Held*, that the vendor was entitled to such balance (a).

Tasaco v. Lucas (30 Law J., N. S., Q. B., 234) explained.

Illegal Contract.—19 Geo. 2, c. 37, s. 1—"Wager Policy"—Underwriters—Jurisdiction.

Whether, the vendor having parted with all interest in the cargo, the underwriters might not have resisted a claim on his part to any portion of the amount insured, upon the ground that the policy was, to the extent of the amount so claimed, "a wager policy," and illegal under 19 Geo. 2, c. 37, s. 1—*Quare*.

But the underwriters having paid the balance into court, the Court, as in *Sharp v. Taylor* (2 Phill. 801), must determine which of the parties is entitled to receive it.

(a) Reversed on appeal by the Lords Justices, vide *infra*, p. 176. ✓

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The ship sailed and arrived in safety at *Falmouth*.

On the 8th of March, 1861, the ship then lying at *Falmouth* for orders, the Plaintiffs, through Messrs. *Alexander* (who acted as brokers for both buyer and sellers), agreed to sell the cargo to the Defendant *Baker*, who agreed to buy the same, upon the terms contained in the following bought and sold note: "*London*, March 8, 1861. Bought from Messrs. *Ralli*, on account of our principals, the cargo of *Odessa* G. wheat, shipped per *Astræa* from *Odessa*, say 3,450 chetwerts, as per bill of lading dated 10/28 Dec., at the price of 52s. 7½d., say fifty-two shillings 7½d. less 2 per cent. per quarter of 492 lbs.; delivered sound or damaged, including freight and insurance, the latter free of war risk, to any safe port in the United Kingdom of *Great Britain* and *Ireland*, now at *Falmouth* for orders; reckoning 100 chetwerts equal to 72 quarters. No charge for demurrage until weight is ascertained. Our 1½ per cent. commission paid by sellers. Payment in *London* in cash, less interest at 8 per cent. per annum for the unexpired term of two months from this date, in exchange for bills of lading and policies of insurance effected with approved underwriters, but for whose solvency sellers are not to be responsible. In case of any dispute this contract not to be void, it being agreed by buyer and sellers to leave the same to two *London* contractors mutually chosen, or their umpire, and to be bound by their decision.—Signed *Alexander & Co.*"

Alexander & Co. rendered a sold note, corresponding to the above, to the sellers, the Plaintiffs.

Baker consigned the cargo for sale on his account to Messrs. *Coombe*, of *Waterford*—they accepting his drafts for £5,533 4s. 5d., which were discounted by Messrs. *Overend, Gurney, & Co.*

On the 13th of March, 1861, the Plaintiffs objecting to *Baker's* cheque, and requiring cash, *Baker* gave them,

through *Alexander & Co.*, an order on *Overend, Gurney, & Co.* for the amount of the invoice, in a printed form, as follows :—" On demand pay to the order of Messrs. *Ralli* the sum of £5,358 17s. 5d., in exchange for bill of lading, charterparty of, and policy of insurance on, cargo wheat per *Astræa*."

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On the 14th of March the Plaintiffs presented the order to Messrs. *Overend, Gurney, & Co.*, who paid the amount in exchange for the bill of lading, charterparty, and policies of insurance, which they forwarded to Messrs. *Voombe* on behalf of *Baker*.

The £3,000 policy, when handed over to Messrs. *Overend, Gurney, & Co.*, had been "short indorsed" by the Plaintiffs as follows :—" We transfer this policy to Messrs. to the extent of £1,700. London, 13th March, 1861." The £4,000 policy was transferred in full.

On the 16th of March the ship and cargo were totally lost.

No question arose as to the £4,000 policy, which was accordingly paid to the Defendant *Baker* in full. But as to the £3,000 policy a dispute arose, the Plaintiffs insisting, that, by reason of the short indorsement, the Defendant *Baker* was entitled to £1,700 only, and that they were entitled to the balance (£1,300) of the £3,000 thereby insured; whereas *Baker* claimed the whole of the £3,000.

Under these circumstances, the Plaintiffs filed their bill against the Company, *Baker*, and *Ionides*, praying to have it declared that the moneys payable under the £3,000 policy were subject to a trust to the extent of £1,300, in favour of the Plaintiffs; and that the Company, or *Ionides*, in case the Company should pay the same to him, might be decreed to pay that amount to the Plaintiffs; and for injunctions against the Company and against *Baker*, founded upon that declaration.

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Upon being served with the bill, the Company paid the £1,300 into Court, and, by arrangement between the parties, the bill was dismissed against the Company and the Defendant *Ionides*.

Statement.

It appeared in evidence, that, on the 18th of March, 1861, *Baker*, upon hearing of the loss of the *Astræa*, wrote to Messrs. *Coombe* as follows:—" *Astræa*, you will see, is unfortunately lost, as I am convinced I would have done better had she arrived."

It also appeared in evidence that *Hobbes*, a junior clerk in the house of *Overend, Gurney, & Co.*, when examining the policies, &c., to ascertain whether they were sufficient to meet the amount of the bills, "noticed the short transfer, but did not pay any attention to the same, as there was a sufficient amount to cover the said bills."

The Defendant *Baker* deposed, that he did not discover the fact of the short indorsement of the policy until the 19th March, 1861.

Argument.

Sir *H. Cairns*, Mr. *Hetherington*, and Mr. *Watkin Williams*, for the Plaintiffs:—

According to the true construction of the contract contained in the bought and sold note, the Plaintiffs, in the events which have happened, are entitled to the £1,300 in Court.

It is a contract by the Plaintiffs to sell, and by the Defendant *Baker*, to purchase, a given cargo afloat, "including freight and insurance;" and upon payment of the purchase-money, the purchaser is to receive in exchange "policies of insurance effected with approved underwriters, but for whose solvency sellers are not to be responsible." The utmost to which the purchaser is entitled, under such a contract, is a policy or policies of such an amount as to indemnify him against the risk he incurs in the event of loss

or damage, the value of the cargo being estimated according to the price of wheat at the date of the contract. The accidental circumstances, that the cargo has been previously insured; that, at the date of the insurance, the price of wheat was considerably higher; and, consequently, that the amount insured is more than sufficient to indemnify the purchaser, as above described—are immaterial. The contract looks to such a policy as shall indemnify the purchaser; and if policies in esse at the date of the contract are more than sufficient for that purpose, the vendors are at liberty, as between themselves and the purchaser, to retain the balance.

Suppose the Plaintiffs had effected, not two, but three policies—one for £4,000, another for £1,700, and the third for £1,300; it is clear that they would have performed their contract by tendering the two former, provided the amount of the two former would have been a sufficient indemnity. Yet this is, in effect, no more than they have done by means of the short transfer of the £3,000 policy.

That this, the natural construction of the contract, was the sense in which the Defendant understood it, is manifest from his own conduct, for the evidence shows that both the Defendant and his agents, Messrs. *Overend, Gurney, & Co.*, looked not to profit, but indemnity, as the result of the policies for which he had stipulated. Down to the time when he heard of the ship's loss, indemnity was all to which the Defendant supposed himself entitled, for, on hearing of her loss, he wrote expressing his regret, adding as the reason, that "he was convinced he would have done better had she arrived;" which could not be, if he supposed himself entitled to the full amount for which the policies were effected, for it is not pretended that he would have realised more than £7,000. Also, *Hobbes*, clerk to Messrs. *Overend & Gurney*, whom the Defendant *Baker* had ordered to pay the money on his behalf in exchange for bills of lading,

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charterparty, and policy of insurance on cargo," says, he noticed the short indorsement when the £3,000 policy was handed over by the Plaintiffs, but "did not pay any attention to it, as there was a sufficient amount to cover the bills."

As against *Baker*, therefore, the Plaintiffs were at liberty to reserve to themselves the £1,300 in question, by means of the short indorsement.

And as regards the underwriters, any objection which they might have raised to perform the contract to insure, upon the ground or supposed ground of such a reservation being in the nature of a "wager policy," and illegal under the Act 19 Geo. 2, c. 37, s. 1, is excluded by their having paid the amount in question into Court; for, the fund being realized, the Court, as in *Sharp v. Taylor (a)*, can determine which of the parties is entitled to receive it.

[They cited also *Benecke's* "Treatise on the Principles of Indemnity in Marine Insurance," pp. 17, 155.]

Mr. *Rolt*, Q.C., Mr. *Druce*, and Mr. *Honyman*, for the Defendant *Baker*, contended that the Defendant was entitled to the fund in Court.

According to the true construction of the contract, the Plaintiffs were precluded from reserving to themselves any interest in the policies of insurance, either by "short indorsement" or otherwise. To test the case in the manner suggested, by supposing three policies to have been effected, is merely trying *idem per idem*, the same question under another form. Even if three policies had been effected, the purchaser, under a contract like the present, would have been entitled to them all. The contract is in effect an assignment in full of all policies then effected upon the cargo sold—an assignment in full of the identical policies effected when the cargo was shipped.

The VICE-CHANCELLOR.—There is no recital, nor any

(a) 2 Phill. 801.

reference specifically to any particular policies. If the parties had meant those specific policies, would they not have said so in the contract?

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Mr. Rolt.—The words “policies effected with approved underwriters” necessarily refer to policies then *already* effected, and, in a document so brief as a bought and sold note, amount to the recital required. In *Tanvaco v. Lucas(a)*, the words were still less definite: “in exchange for shipping documents;” no mention being made of any policy; yet there all the Judges agreed that the contract looked to the policy made at the time of the shipment.

The decision in *Tanvaco v. Lucas* establishes, by an a fortiori argument, the broad principle, that, under a contract like the present, for the sale of a cargo afloat, the value of corn at the port of loading is the proper measure of the policy to which the purchaser is entitled, irrespective of the question whether in the interval corn has risen or fallen in value. The policy to which the purchaser is entitled is such a policy as would have protected the original shipper. In the words of Mr. Justice Crompton, the policy “must cover the value of the goods, and the cost of insurance as at the port of loading. . . . If the original shipper had insured, which he ought to do, or the person who knew of the shipment had insured in *London*, or the party in *Greece* who was shipping had insured—in either of these cases, the policy so effected would be the policy to which the contract refers. That appears unanswerably to be the true view, when you consider that these documents go along with the property into whosoever hands they may come.

. . . . The contract looks to a policy made with reference to the shipment. . . . The insurance must cover” (not the accidental value at the time and place of the making of the subsequent contract for sale—a value which may be much above, or, as here, much below the

(a) 30 Law J., N. S., Q. B., 234.

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value at the time when the policy was effected, according to the fluctuations of the market, but) "the value as at the port of loading. . . . The buyer buys what the seller sells, and puts himself, in effect, in his shoes. If the first man buys from the original shipper, I think he puts himself in his shoes, as it were, and takes the policy from him—supposing the policy is a right policy with regard to the first shipper—and it is not determined by the supposed value that the buyer thinks the goods worth when they come to *England*" (a). Otherwise, observe what consequences would ensue: "To say, that the amount of the policy which was originally the proper shipping document of such a cargo, must vary from time to time, according to the different prices inserted in the different contracts by the different persons passing it from one to another, would be to make the amount of it dependent on the market and the Corn Exchange of this country, and cause that amount to fluctuate with the fluctuations of the corn market; and that would be certainly very inconvenient" (b).

For these reasons, if the price of wheat had risen instead of falling, between the date of the shipment and the date of the contract, the Plaintiffs would have insisted, that, according to the true construction of the contract, the price of wheat at the date of the shipment was the true measure of the sufficiency of the policy. Certainly, they would not have effected, as, according to their own construction, they would have been bound to do, a supplementary insurance. And the reasoning upon which they would have relied if wheat had risen, is not less cogent, because, in the events which have happened, it has fallen in value.

But, even if the Court should adopt the construction for which the Plaintiffs contend, and should hold, that, according to the true construction of the contract, the purchaser

(a) Per *Crompton, J.*, in *Tanvaco v. Lucas*, 30 Law J., N. S., Q. B. 241.

(b) Per *Blackburn, J.*, Id. 243.

was only entitled to such a policy or policies as would have afforded him a sufficient indemnity against the risk he incurred of loss or damage, estimating the cargo according to the price of wheat at the date of the contract, still the result would be the same; for, nothing short of the full amount of the two policies existing at the date of the contract would have afforded him a sufficient indemnity against that risk. For it was not only the risk of the cargo being, as it has been, totally lost, the effect of which has been to relieve the purchaser from the obligation to pay freight, but the risk of its arriving at the port of discharge in so damaged a condition as to be worthless, in which case the purchaser would not only have lost his cargo, but would also have been liable to pay freight, amounting, according to the invoice, to £1,056 6s. 9d.

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The VICE-CHANCELLOR.—I observe, that, in *Tanvaco v. Lucas*, the Lord Chief Justice takes notice that the buyer did not appear to have objected that the policy was insufficient; and he adds—"if, at the time the shipping documents were originally tendered, there had been any objection taken on the score of the insufficiency of the policy, there would have been no difficulty in making good the defect by means of supplementary insurance" (a). In the present case, if the facts were as you state as to the insufficiency of the policies, how came there to be no objection taken by the Defendant when the policies were tendered, on the ground of their insufficiency?

Mr. Druce.—The Defendant was not aware that the £3,000 policy had been short indorsed. He believed it to have been transferred to him in full. He had a right to assume that the Plaintiffs had transferred it in full; for, to entitle a vendor under such circumstances to retain any interest in the policy, an express agreement was requisite:

(a) Id. 240.

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Powles v. Innes (a); and none such had been entered into. He had a right to assume that the cargo for which he was contracting had been insured, as, according to the general practice of merchants, it ought to be, at the port of lading, and therefore in an amount which, from his knowledge of the price of corn at the time of lading, would have afforded him a sufficient indemnity.

Mr. *Hetherington*, in reply :—The contract in *Tanvaco v. Lucas* stipulated for “payment in exchange for *shipping documents*”—words which would include the specific policy or policies of insurance in existence at the date of such payment, and the whole of such policies. In the present contract, the words are not “the shipping documents” specifically, but “policies of insurance” generally. And under such a contract the amount of insurance is left to depend on the risk, and therefore on the price of wheat at the date of the contract.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This case has been so ably and fully argued, that I feel it to be unnecessary to reserve my judgment upon it.

From the commencement, it has been clear to me, that the bought and sold note cannot be taken to have been, in any sense, an assignment of the policies. It is a contract for the sale of “the cargo of wheat shipped per *Astræa* from *Odessa* . . . including freight and insurance, the latter free of war risk, to any safe port in the United Kingdom, now at *Falmouth* for orders.” So far there is not a word about assigning any given policies, or even about the existence of any given policies. It would have been perfectly easy for the parties, had they so intended, to

(a) 11 Mee. & W. 10.

stipulate that the contract should include specifically "the two several policies effected by *Ionides*." But this they have not done. They have stipulated, that the contract is "to include freight and insurance;" which means, that the vendors are bound to pay the freight, and are bound (as we find from the latter part of the instrument), before the purchase-money is paid them, to give a full and complete insurance, of the character there described. Then, in the latter part of the instrument, we find it stated, that payment is to be made in *London*, in cash, "in exchange for bills of lading and policies of insurance, effected with approved underwriters, but for whose solvency sellers are not to be responsible." The purchaser, therefore, when he hands over his money, is to be entitled to have a policy or policies, as the case may be, "effected with approved underwriters;" which, I agree with the Defendant's counsel, means *responsible* underwriters—not persons *to be* approved by the purchaser, but persons against whom no reasonable objection can be taken.

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Then, is there anything in the case of *Tanvaco v. Lucas* tending in the slightest degree to impeach this view of the contract?

In the first place, in *Tanvaco v. Lucas*, the question, whether the contract operated as an assignment specifically of any given policy, could never arise; for there, at the date of the contract, the policy was not ascertained; the cargo even, and the ship, were not ascertained. It was a contract—not like the present, for the sale specifically of a particular cargo on board a particular ship, but, generally, of a cargo which should answer to a given description (a), to be

(a) "I think it is clear, that the present is one of those cases in which a person is bargaining for a cargo which shall answer the description on its shipment, or which shall answer the descrip-

tion on the teller ordering it to be shipped in a particular manner, or by buying a shipment which is already at sea." — Per *Crompton, J.*, in *Tanvaco v. Lucas*, 30 Law J., N. S., Q. B., 241.

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selected by the vendor from among other cargoes answering to that description. There, therefore, the contract could not operate as an assignment specifically of any given policy.

Nor is there anything in *Tanvaco v. Lucas* to show, that the contract in question in the present case can either operate as such an assignment, or entitle the purchaser specifically to any given policy.

In *Tanvaco v. Lucas*, the contract, as I have already stated, was a contract for the sale of a cargo answering to a given description, to be selected by the vendor. It was to be an insured cargo ; for the words were, "including freight and insurance." No mention was made of any particular policy ; but there was a stipulation, in these words, "payment in exchange for shipping documents." Now, by that stipulation the parties clearly shewed, as the rest of the contract was silent on the subject, that they were contemplating such a policy of insurance as would be found among the shipping documents ; for, as the purchaser was to pay his money simply on receiving the "shipping documents," if he did not get a policy under the description "shipping documents," he would get no policy at all. A contract, therefore, so worded, referred of necessity to the particular policy which would be found among the "shipping documents" of the vessel which the vendor might select for the performance of his contract ; and, in the events which happened in that particular case, the policy found among the "shipping documents" of the vessel so selected, was a policy effected at the date of the shipment.

As I read their judgments in *Tanvaco v. Lucas*, all the learned Judges concurred in this view of the case. Mr. Justice *Crompton*, whose observations were mainly relied upon in the argument for the Defendant *Baker*, says, "When you look to the phrase 'shipping documents,' I think that makes the policy connected with the

shipping one of the documents which is meant ;" and he adds this important sentence : " I do not mean to say, that, if by any accident there was no insuring when the cargo was shipped, the contract might not be answered by making a new policy in *London* ; but I think the contract looks to a policy made with reference to the shipment." Why ?—simply, he says, because it is stipulated for under the description of "shipping documents," and under no other description. He adds, afterwards, (and the observation was much relied on by the Defendant's counsel) "The buyer buys what the seller sells, and puts himself in effect in his shoes. If the first man buys from the original shipper, he puts himself in his shoes as it were, and takes the policy from him, supposing the policy is a right policy with regard to the first shipper ; and it is not determined by the supposed value of the goods that the buyer thinks them worth when they come to *England*." But that, and other similar observations which will be found in the case, and which were relied upon in the argument for the Defendant, depend, as it appears to me, upon the circumstance, that, by the terms of the contract in *Tanvaco v. Lucas*, the buyer, in contracting for the right to a cargo of wheat "free, including freight and insurance," had provided a security for that right simply by the stipulation "payment in exchange for shipping documents," that is, in exchange for such policy as would be found among the ship's documents.

In the case before me the contract is wholly different, the stipulation is for payment, in exchange, not for the specific policy or policies which will be found among the "shipping documents," but for "policies of insurance effected with approved underwriters."

To argue that these words, "effected with approved underwriters," point exclusively to policies already effected, is begging the whole question. For the question is, whether a delivery of policies, effected subsequently to the date of the

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contract, but before the date of payment, would not be a sufficient compliance with the terms of the contract. The vendor might not choose—it might not be worth his while—to insure until after the contract had been entered into; and if I were to hold, that the terms of the contract cannot be complied with except by a delivery of policies effected before the date of the contract (of which not one word is said throughout the contract), I should be driven to the conclusion, that, if, at the time fixed for completion of the contract, the vendor should tender a policy of insurance, good and sufficient in every respect, but effected subsequently to the date of the contract, it would be open to the purchaser to object, that, inasmuch as the policy was not in existence at the date of the contract, he was not bound to accept it; and upon that ground alone he might repudiate the contract.

It was argued, that, even if the words “effected with approved underwriters” did not point exclusively to policies already effected, still the purchaser had a right to rely on the general practice of merchants, and, in dealing with a respectable broker, had a right to assume, that the cargo for which he was contracting had been insured at the port of lading, and that the policy or policies by which such insurance was effected, were then in the vendor’s possession; consequently, that, under a contract thus worded, the purchaser had a right to suppose he would receive the particular policy or policies, which he had a right to assume to be so in the vendor’s possession. But no evidence has been adduced to show, that it is the universal custom of the trade to insure ships at the port of shipment. On the contrary, I believe it is the custom of the *East India Company*, and other large firms concerned in shipping, not to insure at all, or (as it is called) to become their own insurers. Such a firm might have sold under a contract like the present, although, at the date of the contract, they had not effected

any insurance ; and by tendering a policy of insurance effected subsequently to that date, they would entitle themselves to performance of the contract.

There is another way of testing the question, although I agree with Mr. *Rolt*, that it is trying *idem per idem*, since the decision can never depend on the mere accident of whether the insurance is contained in one, or in more than one piece of paper :—Suppose the Plaintiffs to have effected insurances by three distinct policies, one for £4,000, another for £1,700, and the third for £1,300, would they have performed this contract by tendering the two former, assuming the two former to have been a sufficient indemnity to the purchaser? I apprehend that they would ; and that, in the case supposed, the vendors might have remained in quiet possession of the third policy, and so attained their purpose, without resorting to the practice of, what is called, ‘short indorsing’ the policy.

The question, to what amount of indemnity the Defendant *Baker* was entitled under the contract, is one which might have been of difficulty if it had been raised before the contract was completed. But it was not : and the claim to more than the amount which the Defendant has actually received upon the policies, has clearly been an after-thought on his part. His case is, that he never looked at the policies. He never asked himself whether there was a policy for £1,300, or for any other amount more than was necessary to indemnify him. It never occurred to him to ask, whether the policies which were handed over were all the policies that had ever been effected on the cargo. He looked to indemnity, and indemnity only ; and, with that view, as the Plaintiffs objected to be paid by a common cheque, he procured Messrs. *Overend & Gurney* to supply the amount of the purchase-money, and the bill which he drew on them for that purpose runs thus :—“ On

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demand pay to the order of *Ralli & Sons* the sum of £5,358 17s. 5d., in exchange for bills of lading, charter-party, and policy of insurance on cargo of wheat per *Astræa*." Beyond this he gave them no instructions. Mr. *Hobbes*, the clerk to Messrs. *Overend & Gurney*, observed the short indorsement; but says "he did not pay any attention to the same, as there was a sufficient amount to cover the said bills." That being done, no further step is taken by the Defendant *Baker*; no inquiry is made by him of Messrs. *Overend, Gurney, & Co.* as to what policies had been handed over to them. Nothing is done until the Defendant hears that the ship is lost; and then he writes to say, he could have made a better bargain if the ship had arrived. It is clear, therefore, that, even at that late period, he had never dreamt of having so good a bargain as this £1,300 extra put into his pocket. It had never occurred to him to imagine, that more had passed to him, under the stipulation in his contract with regard to policies of insurance, than would suffice to indemnify him against the risk he incurred. I called attention, during the argument, to the observation of the Lord Chief Justice in *Tanvaco v. Lucas*, as to the buyer not having raised any objection upon the ground of the policies being insufficient; and I asked how it happened that the objection now taken, that these policies were insufficient, was not raised at the time when they were handed over. It is true, the Defendant *Baker* does not seem to have been aware of the short indorsement of the £3,000 policy; but, on the other hand, it is clear that he was not aware of the amount for which either policy was originally effected. He left the amount of the insurance to Messrs. *Overend & Gurney* to look to, relying upon their taking care that he was sufficiently indemnified. And, in the events which happened, it is clear that he was abundantly indemnified. It is not suggested, that the amount he has already received upon the policies was insufficient to make good the total loss of the cargo; but it

has been ingeniously argued, that, instead of the cargo being totally lost, so as to relieve the purchaser from the obligation to pay freight, it might have arrived at the port of discharge, but in so damaged a condition as to be worthless; notwithstanding which, freight would have been payable; and, in that case, the amount he has received would not have been a sufficient indemnity. But here, again, the same reasoning applies. The question, whether the indemnity was sufficient, was a question to be raised (if at all) when the parties met to complete the contract; and here no one thought of raising the question until subsequently.

For these reasons, it appears to me plain, that there is nothing in the contract to entitle the Defendant *Baker* to the £1,300.

But then comes the question, are the Plaintiffs entitled to it: can the Plaintiffs be heard in this Court to claim an interest in the policy, after parting with all their interest in the subject matter of the insurance?

If this question had been raised by the underwriters, I entertain great doubt, whether they might not have successfully resisted a claim by the Plaintiffs to recover from them any portion of the amount, upon the ground that the policy would be, to the extent of the amount so claimed, in the nature of "a wager policy," and illegal under the Act of Geo. 2 (*a*). But the underwriters have not taken that course. They have paid the money into Court; and, the fund being in Court, *Sharp v. Taylor* (*b*) is more than a sufficient authority to show, that, although it might have been contrary to public policy, to assist the Plaintiffs by enforcing a performance by the Company of their contract to insure, yet as that contract has already been performed by the Company, and the amount realized and paid into Court, the

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(a) 19 Geo. 2, c. 37, s. 1.

(b) 2 Phill. 801.

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Court must determine which of the now litigant parties (the Plaintiff or the Defendant *Baker*) is entitled to receive it.

The only question before me is, who is entitled to the £1,300 in Court; and for the reasons I have stated, I have come to the conclusion that the Plaintiffs are entitled to it. The costs must abide the event. Mr. *Baker*, unquestionably, never dreamt, when entering into his contract, of deriving under it any such benefit as he has claimed in this suit. He must, therefore, pay the costs of the suit, including the costs of the Company and of *Ionides*.

*Minute
 of Decree.*

DECLARE, that, according to the true construction of the agreement of the 14th of March, 1861, and the events which have happened, the Plaintiffs are entitled to the £1,300 paid into Court by the Defendants, the Company, in respect of the policy of £3,000.

ORDER payment accordingly. Defendant *Baker* to pay costs as above.

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 Jan. 31st.

The Defendant *Baker* appealed. The appeal was heard by the Lords Justices, who reserved judgment, and now reversed the decree of the Vice-Chancellor, and held the Defendant *Baker* entitled to all the costs of the suit, including the costs of the successful appeal(a).

[From the decree of the Lords Justices the plaintiffs have appealed to the House of Lords.]

(a) See *Collins v. Burton*, 4 De Gex & Jo. 612.

FARLEY v. BONHAM.

THIS case came on upon a question which arose in Chambers, whether, on a purchase of a gavelkind estate, the widow (married after 1st January, 1834) of a person who had an equitable estate of inheritance was a necessary party to the conveyance. The point had been argued in Chambers but judgment was given in Court.

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 Jan. 25th.
Dower Act
 (3 & 4 Will. 4,
 c. 105—*Gavel-*
kind.
 The Dower Act
 (3 & 4 Will. 4,
 c. 105) extends
 to lands of
 gavelkind te-
 nure.

Mr. *Percival* for the purchaser.

Mr. *Rudall* for the vendor.

VICE-CHANCELOR SIR W. PAGE WOOD:—

The question for my decision in this case arose in Chambers, where the point was argued before me by counsel, whether a purchaser was entitled to require the concurrence of a certain lady in his conveyance. This depended on the question, whether, upon the true construction of the Dower Act, the lady was entitled to dower out of the premises which formed the subject matter of the sale, they being of gavelkind tenure, and her husband's estate having been equitable only. In the course of the argument I was asked to refer to the Report of the Real Property Commissioners, which preceded the passing of the Act, to look at several contemporaneous authorities, and, from the language employed by the Commissioners before the passing of the Act, to determine whether gavelkind lands were or were not within the general scope and purport of the Act. To a certain extent, the authorities prior to the statute may be properly referred to; for the true principle of construing statutes, as I apprehend, is, first, to ascertain clearly what was the state of the law affecting the subject matter at the time of the enactment; and then, from the language of the Act itself, to consider to what

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extent and in what way it may apply to such subject matter. But I cannot go further than this. It is impossible to lay any stress upon the bare expression of intention at the end of the Report to which I was referred, where the Commissioners say, "they do not propose at present to extend the alterations of the law of dower to gavelkind lands or borough English lands, or to copyhold or customary lands, as to all which the right to dower or freebench is regulated by a variety of peculiar customs" (*a*). In order to ascertain the meaning of the Act, I must consider the mischief to be remedied, and for this purpose only I refer to the Report as containing, in a convenient form, a statement of the defects of the law, which the Dower Act has since removed. This is information which the Court must gather from some source, and there is no more legitimate or convenient way of doing it than by referring to the Report made by the Commissioners upon the subject.

They state the evils of the then existing law to be the uncertainty in the old law of dower, springing not so much from the rule of law itself, as from the refinements and modifications which had been introduced into it. On this head, they refer to such questions as—how far dower was barred by the existence of an outstanding legal interest; to the possibility of the wife's dower being defeated by acts done during her coverture; and to the insecurity of titles where dower was not sufficiently guarded against. Looking, therefore, to the insecurity of the wife's right as against her husband, and to the uncertainty of the interest, the Commissioners came to the conclusion, that justice would be done by giving the wife a right to dower, wherever the husband should not have expressed an intention to defeat it, and by extending the privilege to equitable as well as legal estates.

That being the general scope of the Report, the Com-

(*a*) 1st Report, page 19.

missioners, no doubt, reinforced their conclusion by the consideration, that the wife and the husband were unequally dealt with, by curtesy being allowed out of equitable estates though dower was not. As I have said, they proposed to remedy that part of the injustice of the existing law ; and I mention it specifically, because it is the only portion of the Report which has any material bearing on the present controversy.

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In that position of things the Act was passed, and I must turn to that to see how the legislature has dealt with the case. The language used is of the largest and most general kind. The interpretation clause defines the word "land" to include "manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and any share thereof." As an example of the hereditaments which would fall within the exception, annuities have been mentioned, which would pass to the heir without being subject to dower ; and the fact that there were such exceptions to the common law right is noticed in the Commissioners' Report (a).

Then the second section enacts, that "when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint-tenancy), then his widow shall be entitled in equity to dower out of the same land." I notice the precise language of this clause, because it is open to the observation that the contrast is not between interests generally to which dower does, and those to which dower does not, attach, but merely between legal and equitable estates. The words used in this clause appear to me to be clearly large enough to embrace lands of the nature of those which are the subject of the present con-

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tention. To ascertain whether they were intended to have a less effect, it is necessary to look at the other sections of the statute, to see whether they contain any indication of such restricted intention. Now, I find nothing in any part of the Act which in the slightest degree touches the question whether gavelkind lands are made subject to the provisions of the statute; and it is the more important to bear this in mind, because, in *Smith v. Adams* (a), and in *Pondrell v. Jones* (b), it has been held that the Act does not apply to copyhold lands. The ground on which Vice-Chancellor *Stuart* decided the latter case is thus stated:—"The language of the statute itself shows that it refers only to estates which pass by deed, and not by surrender," as may be seen by reference to the 6th section. In *Smith v. Adams*, the reasoning on which the same construction of the statute was adopted, was not stated either in the Rolls Court or by the Lords Justices. Probably, it was the same which Lord *St. Leonards* has frequently expressed, namely, that the mischief against which the statute was directed did not exist with reference to copyholds, because the alienation of the husband was in general sufficient under the old law to deprive his wife of her freebench. Whether that was the ground of the decision in *Smith v. Adams* or not, there are these two considerations applicable to the case of copyholds, that the Act appears to contemplate only estates which pass by deed, and that freebench was generally subject to the husband's disposition.

Neither of these reasons applies to gavelkind land, for that does pass by deed, and the evil intended to be remedied existed as much with reference to land of that tenure, as in the case of ordinary dower. My attention was also called in the argument to the fact, that, in the definition of the word "land" in the "Fines and Recoveries Act," 3 & 4 Will. 4, c. 74, and the "Descent Act," 3 & 4 Will. 4, c. 106, which

(a) 18 Beav. 499; and on appeal 5 De G., M., & G. 712.

(b) 2 Sm. & G. 407.

are founded on the report of the same Commissioners, the words "of any tenure" were introduced in the one case, and gavelkind lands were expressly included in the other, whereas, in the Dower Act, these words were, it was said, carefully excluded. This, undoubtedly, is so; and there was a very good reason why such an expression should be used in the Fines and Recoveries Act, because it was most desirable to have some express declaration by the legislature as to interests which might otherwise seem, from their nature, to be excluded from the operation of the statute. So, also, in the Descent Act, there being a marked distinction between the laws of descent applicable to fee-simple and to gavelkind lands, it is not surprising that the legislature should have used express words to say that the Act should apply to both species of tenure. It would, however, be very dangerous to hold, that, as a general rule, all gavelkind lands must be taken to be excluded from the operation of an Act which applies in terms to all hereditaments, merely because the words "of whatever tenure" are not employed. It would be impossible to foresee the consequences of such a principle of construction. The opposite doctrine was in early times applied to copyholds, which in *Shaw v. Thompson* (a) were held to be within the Statute of Merton, in which no mention is made of any particular tenure, it being considered that the remedy given by statute must be taken to be co-extensive with the mischief to be remedied.

It was further contended, that the mischief as regards dower did not exist to the same extent with reference to gavelkind as to fee simple lands. There is no foundation for this argument, except the remark of the Commissioners as to the different features of dower and curtesy with reference to gavelkind lands. The contrast between the doctrines established as to dower and curtesy was not, however, the principal mischief of the old law, which was

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v.
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Judgment.

(a) 4 Rep. Copyhold Cases, fol. 30

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 Judgment.

the insecurity of purchasers, and the doubtful character of the protection afforded by outstanding interests. If I hold that a wife is not entitled to dower out of an equitable interest in gavelkind land, I must also hold that a husband, married after the passing of the Act, has no power of making a title free from his wife's dower. The reasons which led to the change of the law apply as much to land of gavelkind as of any other tenure.

Another argument was, that dower in gavelkind was not, strictly speaking, dower at all; and that it must therefore be assumed not to be included under the general language of this statute. Reference was also made to the Disgavelling Act (31 Hen. 8, c. 3), which has been construed to extend to no part of the custom of gavelkind, except the rules of descent. It was enacted by that statute, that the land should be disgavelled, and should be descendible as at common law, and should be inherited, devised, and adjudged to be like as land at common law, words which in themselves might suffice to reach any incidents whatever of that tenure; but it was decided, that the Act did not apply to the right to dower, which attached to the land under the custom of gavelkind. And it has been contended in this case, that a marked distinction was drawn between dower at common law and dower under the custom. But the reason of these decisions is plain. The Act was construed as a deed would be construed, and it was apparent that the only object was to alter the rule of inheritance. Any other construction would have worked private injury, and would have rendered the land liable to escheat; and for these reasons the statute was so construed as to confine its operations to the purpose which it appeared to contemplate.

A further argument was founded on the case of *Minet v. Leman* (a). A passage was cited from the judgment

(a) 20 Beav. 269.

of the Master of the Rolls, in which the principle of construction is laid down, that general words in a Statute are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to them consistent with the intention of preserving the existing policy untouched. In these observations I entirely concur, and I recently applied the same principle to the construction of the Merchant Shipping Act, disregarding the supposed intention of the framers of that Act, as I feel bound in this case to disregard, for purposes of construction, the recommendations contained in the Report of the learned Commissioners. But what is there, in holding gavelkind lands to be within the Act, to alter the policy of the law, further than the statute itself plainly intended to alter it? The policy of the Act was to alter the law in two particulars, and the reasons for the change are as applicable to gavelkind as to any other land. The changes of policy effected by the Act were, to make a widow dowerable out of equitable estate, and to make the husband's assignment during the coverture effectual to bar dower; and I am introducing no further change of policy by holding these provisions to extend to land of gavelkind tenure. The policy of such a change must be the same with respect to common law dower and to dower by the custom of gavelkind.

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 Judgment.

Although Mr. *Rudall* in his argument availed himself of the observations I have cited from the judgment in *Minet v. Leman*, that case is really an authority against his contention, because the decision was, that the General Inclosure Act applied to gavelkind land, notwithstanding difficulties in the way of that construction much greater than any which the Dower Act presents. There were serious difficulties with reference to the possible effect of the Act upon the future tenure of the land exchanged, and to the possibility of transferring that

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 FARLEY
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Judgment.

peculiar tenure to land in *Middlesex*, and others of the like kind. However, it was held, that that statute was applicable to gavelkind land.

With regard to the alleged distinction between common law dower and the right to dower by the custom of gavelkind, I may refer to *Robinson* on Gavelkind (a), as containing, in my opinion, an accurate statement of the law on this point. The widow's right under the custom is there described as being quite as strong as the common law right to dower; the substantial difference being, that the widow takes under the custom a larger share than she would be entitled to at common law, and must plead the custom to establish the extent of her share; but in all other respects she has the common law remedy to protect her rights. I find nothing in the way in which the term 'dower' has been used with reference to gavelkind land, to indicate that this right is a subject matter distinct from that with which the statute deals. There is nothing in the general language of the Act tending to exclude gavelkind land from its operation—not a single word inconsistent with the construction which I adopt. A class of authorities was referred to, in which it has been laid down that existing customs are not to be considered as abrogated by Acts of Parliament, unless they are expressly referred to. One of these cases was *Truscott v. The Merchant Tailors Company* (b), a decision as to the operation of the Prescription Act with reference to the right to light as modified by the custom of *London*. There it was held, that the words, "any local usage or custom to the contrary notwithstanding," clearly excluded the custom of *London*. Mr. Justice *Williams*, it is true, made the observation, that, but for the non obstante clause, the Act would not have abrogated the custom of *London*; but he was the only one of the Judges who took this line of reasoning; and, much as I respect his opinion, I

(a) Book 2, ch. 2.

(b) 11 Exch. 855.

cannot assume that the view he took in that case is universally applicable, whatever may be the nature of the custom in question, or the character of the statute by which the general subject matter is dealt with. Where there is a local custom, beneficial to the inhabitants of a particular place, there may be much to be said in favour of the doctrine, that nothing short of an express enactment directed to it, can abrogate the privilege. But the case is very different, where the operation of the Act is mutual, as is the case with the Dower Act, under which each of the parties affected—the husband and the wife—would derive a benefit from the application of the statute to the customary right. In the *Merchant Tailors case*, moreover, it is to be observed, that the custom, with reference to which the observations of Mr. Justice *Williams* were made, was one that had been sanctioned and confirmed by various Acts of Parliament.

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 FARLEY
 v.
 BOWHAM.
 Judgment.

On the broad principle, therefore, that the language of the Dower Act is large enough to reach the case of gavelkind land, that the reasons for the change of the law thereby effected, apply as fully to land of this as of any other tenure, and that there is not a single word in the Act to militate against this construction, I must hold that the Act applies, that the widow is entitled to dower out of the equitable gavelkind estate of her husband, and that her concurrence in the conveyance is necessary.

The purchaser ought not to be put to expense by the unsuccessful resistance of the vendor, and the decision must therefore be with costs.

1862.

Feb. 8th.

Declaration of
Trust.

RE GLOVER.

A testator entered in a memorandum book, and signed a memorandum, that he had decided to invest the future proceeds of an annuity which had been absolutely assigned to him by his second son *F.*, and that he intended to leave the proceeds at his death to *F.*'s daughter.

An account, also in the testator's handwriting, was found, of the investments of the annuity "from the period that I determined thus to appropriate this money."

On his death-bed the testator referred his eldest son to the account-book, and said that he wished the accumulations to be given to the daughter of *F.*, and the annuity at his death to revert to *F.* The annuity and accumulations were undisposed of by the will.—*Held*, that there was no declaration of trust, and that the annuity and accumulations went to the next of kin.

THIS was a petition by the widow and next of kin of *J. H. Glover*, deceased, for payment out of court of the produce of £380 3l. per cent stock, which had been paid in under the Trustee Relief Act by the executor of the said *J. H. Glover*, who died on the 23rd of May, 1860.

The testator, at the time of his death, was possessed of an annuity of £50 during the life of his son *Frederick Glover*, which had been bequeathed to the son and by him assigned to the father on the 2nd of April, 1846. The testator was also possessed of £380 3l. per cent. stock, which he had accumulated by investing the proceeds of the said annuity in his own name. The testator's will passed a policy for £1,000, but all the rest of his personal property was in effect undisposed of.

From January, 1854, until his death, the testator invested the whole of the proceeds of the annuity, and had made the following memorandum in his own handwriting in a book indorsed "*Annie*."

"Memorandum, January, 1854.—The entries on this side of this book denote the various purchases of stock I have made from the proceeds of the annuity bequeathed to my second son *Frederick Glover*, and which annuity was wholly and absolutely made over to me by a legal instrument, on his obtaining a writership in *India*. His marriage, however, and the heavy expenses he has in consequence been obliged to incur, render it desirable that every precaution should be taken to meet contingencies for the sake of his children, and I have therefore decided from

this time forward to invest this money as I received it in the Funds, the proceeds of which I intend to leave at my death to his present eldest child, *Annie*.

"J. H. GLOVER"

1863.
RE GLOVER.
Statement.

There were no entries of amounts in the said memorandum-book, but an account was found in the handwriting of the testator, as follows :—

"Account of the various investments of *Fred.*'s annuity of fifty pounds (minus the income-tax), left to my son by his godfather, Sir *F. A. Barnard*, with the interest thereon (and some additions of my own), from the period that I determined thus to appropriate the money, which had previously to *Fred.*'s departure to *India*, been made over to me.

Data.	Recvd. from Ocutis'.	Added by me.	Intrat less incometax	Sum in- vested.	Amount purchased	Total
1854.	£ s. d.	£ s. d.	£ . d.	£ s. d.	£ s. d.	£
April 5	23 10 10	1 9 2		25 0 0	28 10 3	
October 11	23 10 10	1 14 6		25 15 4	27 0 0	
1855.						
May 29	23 10 10	1 9 2		25 0 0	27 0 0	
October 13	23 6 8	0 19 10		24 6 6	27 9 9	110
1856.						
April 11	23 6 8	0 10 9	4 2 10	28 0 3	30 0 0	140
October 13	23 6 8		2 2 2	25 8 8	25* 0 0	165
1857.						
April 21	23 6 8	4 9 10	2 9 6	32 13 8	35 0 0	200
For last investment	2 7 8					
1858.						
January 16	23 8 11	3 12 11	5 16 6	29 15 5	30† 0 0	250
April 20	24 5 5			29 2 9	30 0 0	260
For last investment	1 4 5					
October 6	24 9 7	1 6 0	3 16 5	29 12 0	30 0 0	290
			full intrat £3 10s on £290 less			
1859.			tax			
March 18	24 9 7	0 1 2	4 5 3	28 16 0	30 0 0	320
			4 14 0	28 16 0	30 0 0	†350
October 11	24 9 7					
1860.						
March 27	23 12 11		4 19 4	28 7 0	30 0 0	380

* The sum invested to purchase this £25 Stock was only £23 1s. and the difference between this and £25 8s. 8d., the amount in hand, viz., £2 7s. 8d., to be carried to the next investment.

† The purchase of this sum came to £28 11s., leaving balance for next investment £1 4s. 5d.

‡ In hand 7s. 7d.

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 RE GLOVER.
 Statement.

The memoranda were not communicated to any one in the testator's lifetime, except that, on his death-bed, the testator referred his eldest son to the account-book containing the account of the accumulations, and declared his wish to be, that the accumulations should be given to "*Annie*," and that the annuity should, at his death, revert to his son *Frederick*.

Argument.

Mr. *Southgate*, for the Petitioners.—The memoranda only express testamentary intentions of the testator, which were not carried into effect by any duly executed testamentary instrument. They are clearly not declarations of trust, binding on the testator from the time when he wrote them. Notwithstanding these expressions of intention, the property remained under his own control to his death, and was left undisposed of by will. It must, therefore, go to the widow and next of kin: *Ex parte Pye* (a), *Cotteen v. Missing* (b), *Lewin on Trusts* (c).

Mr. *James*, Q.C., for *Annie Glover*.—The memorandum was a completed act amounting to a declaration of trust. All that is necessary for that purpose is, that a final intention to dedicate the property to the particular purpose should appear; and this does appear from the original memorandum, and is confirmed by the subsequent dealings with the fund.

Mr. *Rolt*, Q.C., for *Frederick Glover*.—We have an instrument which is not testamentary, and which expresses the intention of the testator as to the disposition of the fund. This is sufficient to constitute an effectual declaration of trust: *Wheatley v. Purrr* (d), *Meek v. Kettlewell* (e).

Mr. *Busk* for the executor.

(a) 18 Ves. 140.

(c) 3rd ed. p. 81.

(b) 1 Madd. 176.

(d) 1 Keen, 561.

(e) 1 Hare, 464.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

1861.
Re GLOVER.
Judgment.

It seems to me impossible to hold that the testator irrevocably bound this fund by the memorandum of January 1854. It is not at all an uncommon thing for persons of methodical and business-like habits, to enter in their memorandum and account books dispositions of their property which they contemplate making; and I cannot foresee how serious all the consequences might be of holding every such note of an intention to amount to a declaration of trust. A person might make a note against an entry of a certain fund, to the effect that he intended leaving it to a charity. Could it be said that he would thereby lose his dominion over it, and be compellable by the charity to hold it for them? In this case there can be no doubt that the testator really had, in his own mind, the intention which he has expressed in this memorandum. He meant, therefore, to appropriate the proceeds of this annuity for the benefit of his son's daughter, having regard to the source from which it was derived. But this is all. He states how he obtained the annuity, notes the purchase of certain stock with the proceeds, and goes on to say that his son's marriage, and his consequent expenses, rendered it desirable that every precaution should be taken to meet contingencies, for the sake of his children, and adds, "I have therefore decided from this time forward to invest this money as I received it in the Funds; the proceeds of which I intend to leave at my death to his present eldest child *Annie*."

How can I construe this into a declaration of trust? There is no declaration of a trust for the daughter, nor anything more than a memorandum of an intention which it would be open to him at a future time to change.

The second paper does not carry the case a single step

1862.

R. v. GLOVER.

Judgment.

further. It is only a careful account of the investments of the annuity made from time to time, in pursuance of his original determination so to invest it. This only carries it back to the first memorandum, the word "appropriate" in the account referring only to such intention as is to be found in the memorandum referred to.

The question is not, whether it would be consistent or inconsistent with the testator's intention, to give the fund to his granddaughter, but whether the words "I intend to leave at my death," amount to an irrevocable declaration of trust. The memorandum was not communicated to any one in the testator's lifetime, except to the eldest son, when the testator was on his death-bed; and that communication is much more consistent with the idea of a testamentary intention than of a concluded trust. It is simply a declaration of his wishes to one who, he thinks, will be able to carry them into effect, and as far removed as possible from a declaration of trust. It was clearly not a declaration of trust as to the annuity; and I cannot find anything more with reference to the accumulations than an expression of a testamentary intent. However much I may regret that this wish was not carried into effect by the testator, I can only hold that this fund is undisposed of, and passes with the annuity to the next of kin.

1889 281

IN RE WARDE.

THIS was a petition by the surviving trustee of the settlement made on the marriage of Lieut. *Warde* and *Augusta Smith* (now *Augusta Warde*, widow), praying for the appointment of a new trustee, and for the judicial opinion of the Court, under Lord *St. Leonard's* Acts (a), as to the propriety of a proposed sale and reinvestment of the trust funds in *East India* Stock.

By the settlement, dated 1841, Lieut. *Warde* covenanted to transfer to the trustees of the settlement £3,000, Three-and-a-half per cent. Government Stock or Perpetual Annuities, then standing in his name in the books of the Bank of *England*, upon trust to pay the dividends to himself during the joint lives of himself and his intended wife, and upon the decease of either to the survivor for life, "and after the decease of the survivor then upon trust to sell out the same," and to pay the proceeds amongst the children of the marriage as therein mentioned.

By the same indenture Sir *Lionel Smith*, the late father of *Augusta Warde*, covenanted to bequeath, by his will, to the said trustees "the sum of £7,500 sterling, to be invested in their joint names in the books of the Governor and Company of the Bank of *England*," upon the same trust as the £3,000 Three-and-a-half per cent. Government Stock or Perpetual Annuities.

The settlement contained no power to vary investments.

After the marriage, Lieut. *Warde* transferred the £3,000 Three-and-a-half per cent. Annuities into the names of the trustees; and on the decease of Sir *Lionel*, in 1842, his personal representatives, with the consent of the trustees,

(a) 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38.

1861.

Dec. 7th & 18th.

*Investments—
East India Stock
—Bank Stock—
Lord St. Leonard's Acts—
22 & 23 Vict. c. 35, s. 32—23 & 24 Vict. c. 38, s. 12—Power to vary Investments.*

The 32nd section of the Act 22 & 23 Vict. c. 35, enabling trustees, in certain cases, to invest their trust funds in Bank Stock or *East India* Stock, does not apply to a case where the trust fund is already invested in Bank Annuities, and the trustee has no power, independently of the Act, to vary any investment.

1881.
IN RE WARDE.
Statement.

invested £7,500 sterling, in satisfaction of his covenant, in the purchase of £7,926 0s. 6d. Three per cent. Reduced Annuities (now represented by £7,814 11s. 9d. like Annuities), in the names of the trustees of the settlement.

Lieut. *Warde* died leaving four children of the marriage.

The question for the judicial opinion of the Court was—

“Whether the £3,000 New Three per cent. Annuities, and £7,814 11s. 9d. Three per cent. Reduced Annuities, or any part thereof, may safely be sold by the petitioner, or the trustee or trustees for the time being of the settlement, and the proceeds invested in the purchase, in the names of the petitioner or of such trustee or trustees, of *East India Stock*; and whether, on any future occasion, any variation can safely be made by the trustees of the trust premises in the investment thereof.”

Argument.

Mr. *W. R. Ellis*, for Mrs. *Warde*, the tenant for life, contended, that the question should be answered in the affirmative. The settlement of 1841—the only instrument creating the trust—did not expressly forbid the trustees to invest any part of their trust fund in *East India Stock*; and by the 32nd section of Lord *St. Leonard's* Act of 1859 (a) (made retrospective by the 12th section of the Act 23 & 24 Vict. c. 38), “when a trustee shall not by some instrument creating his trust be expressly forbidden to invest any trust fund on *East India Stock*, it shall be lawful for such trustee to invest such trust fund on such stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in

(a) 22 & 23 Vict. c. 35.

ether respects be reasonable and proper." Here the investment would be reasonable and proper.

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IN RE WARDE.
Argument.

Mr. *Hetherington*, for the four infant children of the marriage, would not oppose an investment in *East India* Stock, but submitted to the Court whether the 32nd section of the Act was applicable to a settlement, where, as here, there was no power to vary investments. The fund was not in cash, but in stock; to invest it as proposed, the trustee must first sell it out and convert it into money; and to sell out or convert it into money, he had no power either under the settlement or under the Act. If the preliminary step could not be taken, did the Act enable him to take a subsequent one?

Cur. adv. vult.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Dec. 18th.
Judgment.

The question upon which my opinion is asked is, whether, under the 32nd section of the Act 22 & 23 Vict. c. 35, the trust funds mentioned in the petition may safely be sold, and the proceeds invested in *East India* Stock.

The 32nd section enacts, that, when a trustee shall not by some instrument creating his trust be expressly forbidden to invest any trust fund in *East India* Stock, it shall be lawful for him to invest such trust fund in such stock, adding, "and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper."

In this case the trust funds are invested in Bank Annuities, and there is no power to vary any investment.

Independently of any other objection, there is great doubt whether the proposed sale and reinvestment would be

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IN RE WARREN.
Judgment.

"in other respects reasonable and proper," within the meaning of the latter clause of the 32nd section of the Act.

But I prefer to rest my decision upon the broader ground, that the 32nd section of the Act refers to those cases only where a trustee has power, independently of the Act, to make *some* investment of his trust fund, and operates in those cases, but in those cases only, to enlarge the class of legitimate investments.

In the present case, the entire fund being already invested, and the trustee having no power to vary any investment, the 32nd section of the Act does not apply.

I must, therefore, answer the question in the negative.

Minute of Order. DECLARE, that the Bank Annuities in question, or any part thereof, may not safely be sold by the petitioner, nor the proceeds invested in the purchase of *East India Stock*.

6 Eq 4 13 Eq 222 320 6 78 84 47 31/Dec 200
32 648 2

1863.

Mar. 3rd & 5th.

Wills—Administration—Devised Estates in Mortgage—Exoneration of—
Locke King's Act—17 & 18 Vict. c 113—
"Contrary or other intention"—Cum Onere.

MELLISH v. VALLINS.

4 Eq 413
JAMES WALBRIDGE by his will, dated 1857, devised his lands in the parish of *Soders*, in the county of *Dorset*, to trustees, in trust to pay the rents to his wife for her life; and, after her decease, he directed the trustees to sell the

A bequest of personalty, "subject to the payment thereof of all testator's just debts," following a devise of land in mortgage, which made no reference to the mortgage:—*Held*, a sufficient indication of an intention on the part of the testator that the land should not, under the Act 17 & 18 Vict. c. 113, be primarily liable to the payment of the mortgage debt.

Therefore, under a will so worded, the mortgage debt and interest ought to be borne and paid out of the testator's personal estate.

Observations on a dictum of Lord Campbell, C., in *Woolstencroft v. Woolstencroft*, 6 Jur., N. S., 1171.

said lands, and to stand possessed of the money arising from the sale in trust for the Plaintiffs. After which the will proceeded as follows :—" And as to all my household goods, furniture, stock-in-trade, and other personal estate whatsoever and wheresoever, I give and bequeath the same unto my said wife for her absolute use, subject to the payment thereof of all my just debts, funeral and testamentary expenses." The testator concluded by appointing his wife sole executrix of his will.

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MELLISH
v.
VALLINS.
Statement.

The testator died shortly after the date of his will. His widow survived him, and died in June, 1860, having by her will appointed the Defendant *Martha Vallins* her executrix, and bequeathed to her all her property absolutely.

The real estate was subject, at the testator's death, to a mortgage for £600, created by the testator in 1849. The interest was kept down by his widow.

In January, 1861, the trustees sold the real estate for £1,240.

&

The question for the decision of the Court was :—

" Whether, according to the true construction of the testator's will, the mortgage debt of £600 and interest ought to be borne or satisfied out of his personal estate in exoneration of his real estate so devised upon trust as aforesaid ; or whether it was primarily chargeable upon the said real estate, and ought to be borne by the proceeds of the said sale accordingly."

Mr. Willcock, Q. C., and Mr. G. L. Russell, for the Plaintiffs :—

Argument.

According to the true construction of the will, the real

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 MELLISH
 v.
 VALLINS.

Argument.

estate ought to be exonerated from the mortgage, by payment of the debt of £600 thereby secured out of the testator's personal estate.

Locke King's Act (a), which makes the land "primarily liable to the payment of all mortgage debts with which the same shall be charged," applies only to cases where the testator or deceased person, at whose death the lands were charged, "shall not, by his will, or deed, or other document, have signified any contrary or other intention." Here, by the bequest of all his personal estate to his wife, "subject to the payment thereof of all his just debts," the testator has signified such "contrary or other intention." The Act, therefore, does not apply.

[They cited—*Smith v. Smith (b)*, *Greated v. Greated (c)*, *Stone v. Parker (d)*, and *Allen v. Allen (e)*.]

Sir *Hugh Cairns*, Q.C., and Mr. *Freeling*, for the Defendant *Martha Vallins*, contended, that the mortgage debt was payable out of the real estate in exoneration of the personal estate.

The Act applies to all cases where the testator has not "signified a contrary or other intention." The words, "subject to the payment thereof of all my just debts," do not amount to a direction, such as was found in *Stone v. Parker* and in *Greated v. Greated*, to pay the mortgage debt out of the residuary personalty. This is not a bequest of the testator's personal estate upon trust to pay thereof all his just debts. It is merely an expression of that which the law would have implied—namely, that the residuary legatee is to take nothing until all the testator's just debts are paid. It leaves the question as to the fund

(a) 17 & 18 Vict. cap. 113.

(b) 7 Jur. N. S. 1140.

(c) 26 Beav. 621.

(d) 1 Dr. & Sm. 212.

(e) 10 W. R. 261.

primarily applicable for their payment, to be determined by the Act, of which the testator must be taken to have been cognisant. It is, in effect, no more than the direction in *Pembrooke v. Friend* (a), that all the testator's just debts should be paid.

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v.
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—
Argument.

Stone v. Parker (b) was determined before the decision of the late Lord Chancellor (Lord *Campbell*), overruling Vice-Chancellor *Stuart*, in *Woolstencroft v. Woolstencroft* (c)—a decision which is of value, as laying down this clear and intelligible principle for the determination of all questions arising under the Act, namely, that "the same rule should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money, as was before observed with respect to exempting the personal estate, the mortgaged land being now primarily liable, as the personal estate had been liable previously" (d).

Mr. *F. Webb* appeared for the trustees of the will.

Mr. *Willcock*, Q. C., in reply.—The rule which the Defendants deduce from the decision of the late Lord Chancellor in *Woolstencroft v. Woolstencroft*, was a dictum not necessary to the determination of that case, where, as Lord *Campbell* expressly observed, the direction was, that the testator's debts should be paid, not out of his personal estate, but out of his estate generally.

In *Pembroke v. Friend* nothing was said by the testator as to the fund out of which his debts were to be paid, and the direction was simply, that all his just debts should be paid as soon as might be after his decease.

Cur. adv. vult.

(a) 1 J. & Hem. 132.
(b) 1 Dr. & Sm. 212.
(c) 6 Jur., N. S., 1170.

(d) Per Lord *Campbell*, C., in
Woolstencroft v. Woolstencroft, 6
Jur., N. S., 1170.

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v.

VALLINS.

March 5th.
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question to be determined in this case is, whether the bequest in the will of the testator, *James Walbridge*, of all his personal estate to his wife, for her absolute use, "subject to the payment thereof of all his just debts, funeral and testamentary expenses," contrasted with the devise of his real estate, in which he takes no notice whatever of a mortgage, is a sufficient indication of an intention on his part that such real estate should not, under the Act 17 & 18 Vict. c. 113, be primarily liable to the payment of the mortgage debt.

The principal difficulty in the case arises from an observation thrown out by the late Lord Chancellor in the case of *Woolstencroft v. Woolstencroft* (a).

It is true that Lord *Campbell* carefully guarded his decision by adverting to the circumstance of the testator having directed all his debts to be paid by his executors, not "out of his personal estate," but "out of his estate" generally—which, of course, would be a sufficient ground for the decision. But his Lordship went on to say, "I think the same rule should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money, as was before observed with respect to exempting the personal estate—the mortgage land being now primarily liable, as the personal estate had been liable previously."

Vice-Chancellor *Stuart* has expressed some doubt whether this observation is correctly reported; but I have no doubt that it is so.

The old rule, to which Lord *Campbell* refers, with respect to exempting personal estate, may be deduced from the authorities—all of which were reviewed by Lord *Eldon* in detail in the case of *Bootle v. Blundell* (b)—to have been,

(a) 6 Jur., N. S., 1171.

(b) 1 Mer. 193.

that, in order to exonerate the personal estate, you must find in the will not only an intention to charge the real estate with the testator's debts, but also an intention to exonerate the personal estate from those debts—the mere charging the realty did not of itself operate as an exoneration of the personalty.

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—
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Now, if, in cases under the Act, the same rule ought to be observed with respect to exonerating mortgaged land from the payment of the mortgage money, as was before observed with respect to exonerating the personal estate—which is what Lord *Campbell* has suggested—in other words, if, in order to exonerate the mortgaged land, you must find in the will, not only an intention to charge the personal estate with the mortgage debt, but also an intention to discharge the mortgaged land from that debt—then it would be necessary for me to hold, that, according to the true interpretation of the present will, the mortgaged land is not exonerated from the mortgage debt in question.

But I have not been able to satisfy myself, that, in cases under the Act, the rule suggested by Lord *Campbell* is applicable.

Looking to the reasons of the rule, I find that its progress, until it assumed the shape in which Lord *Eldon* states it, was gradual.

In its origin, it was applied to a charge of debts on the testator's real estate, which, without such a charge, was not liable at that period of the law to the simple contract debts of a testator. In such cases, the charge of debts was considered as creating an entirely new fund for their payment, consisting, as it did, of property which was not then subject to simple contract debts at all; and looking to the leaning of the Courts, at the time when this rule was first established, in favour of the heir, and of protecting the real

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estate, it was natural that the Courts should interpret such a charge as indicating an intention on the part of the testator to provide for the payment of his just debts, by augmenting the fund already available for that purpose, and not in any way as an indication of an intention, as between the two funds (the real and personal estates), that the personal estate should not be first exhausted.

It may be said in answer to this view, that mortgage debts were not precisely in the same position, such debts being already an actual charge upon the land. But inasmuch as in equity the land was always considered merely as the surety for payment of the mortgage debt, and the personalty as the principal, the land being thrown in as security, mortgage debts were brought, at least in this Court, within the operation of the same rule; and the land, which, in the contemplation of this Court, was not in any way charged until the personalty had been exhausted, was looked upon merely as a subsidiary fund for the payment of the mortgage debt with which it was charged.

Following the progress of the rule, it was settled as early as *Serle v. St. Eloy*, in *Peere Williams* (a), that a devise of land "subject to the mortgage or incumbrance thereupon" did not so throw the charge on the land as to exempt the personalty—the testator being considered to use the terms merely as descriptive of the incumbered condition of the property, and not for the purpose of subjecting the devisee to the burthen—a construction as to which Mr. *Jarman* has not without reason remarked, that "probably it generally defeats the intention of the testator" (b).

I have sufficient recollection of the discussion which took

(a) 2 P. Wms. 386.

(b) 2 Jarm. Wills (2nd ed. 534).

place in Parliament when the Act in question was introduced, to know that the construction thus put by the Courts upon a devise of land "subject to the mortgage thereon," and its effect in defeating the intention of the testator, was one of the arguments relied on for inverting the rule of law, and enacting, that when a testator devises lands which are burthened with a charge, unless he has "signified a contrary or other intention," he must be presumed to mean that his devisee shall take the estate so burthened, and that his personalty shall not exonerate it.

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 Judgment.

In the will before me, that which the Legislature has made the secondary fund for payment of a mortgage debt—i.e. the personalty—is bequeathed by the testator, "subject to the payment thereof of all his just debts;" and the question is, whether, regard being had to the circumstances which led the Courts to adopt the rule of construction to which I have referred, and the reasons for its adoption, the converse of that rule is now to be imported into the construction of the statute,—in other words, whether the Court is to shut its eyes to any conclusion to which it might otherwise be led by the words of the will, and to hold, that, unless a testator has signified an intention not only that his personal estate shall bear a mortgage debt, but that the mortgaged estate itself shall not bear that debt, he has not signified such a "contrary or other intention" as the Act requires in order to prevent its operation. I think I am not bound to import such a rule into the construction of the statute.

The case of *Marshall v. Holloway* (a), as explained by Lord Justice Turner, when Vice-Chancellor, in the subsequent case of *Fitzwilliams v. Kelly* (b), although decided anterior to the passing of the statute now under consideration, has a strong bearing upon the present question. There

(a) 5 Sim. 196.

(b) 10 Hare, 277, 278.

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the testator, having a leasehold estate on which he had covenanted to erect certain buildings within a specified time, bequeathed it, and also his general personal estate, subject as to the latter to the payment of his debts, to trustees for one for life, with several limitations over; and Vice-Chancellor *Shadwell* held, that although, according to the ordinary rule of law, leaseholds specifically bequeathed bear the burthen of the covenants contained in the lease, yet, according to the true construction of the will before him, the general personal estate of the testator was liable to the performance of the covenant.

Commenting upon that case, Lord Justice *Turner* observes, that although it seems at first sight an extremely strong decision, it rested upon this ground:—"The Vice-Chancellor," he says, "considered that there was an express intention to discharge all debts out of the general personal estate; the devise being of all the real, leasehold, and personal estate, upon trust to get in the personal estate and thereout to pay the debts. . . . That case, therefore, went on the particular provisions in the will, and not on any general rule of law. The Vice-Chancellor considered that what was given to the legatee was the whole leasehold estate, and that the charges upon it fell to be paid out of the general personal estate" (a).

In the will before me, I have provisions precisely similar: I have a devise of mortgaged lands to trustees, but taking no notice of the mortgage to which they are subject; I have a direction to the trustees to pay the rents to the testator's wife for life, without taking any notice of the mortgage; I have a trust for sale after her death, with directions to stand possessed of the money arising from the sale in trust for the Plaintiffs, without the least reference to the mortgage; and this is followed by a bequest

(a) 10 Hare, 278.

of all the testator's personal estate to the testator's wife, "subject to the payment thereof of all his just debts, funeral and testamentary expenses."

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I apprehend that no person of ordinary intelligence, reading a will of this description, could avoid the conclusion that the testator meant his debts due on mortgage, in common with all his other debts, to be paid out of his personal estate, and not out of the estates on which they were charged.

The rule of construction suggested by Lord *Campbell* would have the advantage of being a general rule of construction ; but the application of it to such a will as I have before me, would frustrate the intention of the testator : and the adoption of general rules of construction which frustrate the particular intent of a testator ought not to be extended.

The decision under the old law, that, where lands were devised "subject to the mortgage thereupon," the words "subject to the mortgage thereupon" were merely descriptive of the condition of the property, and no indication that the devisee was to take cum onere, was a strong decision, which could only have arisen from the favour extended at that period of the law to real estate. I feel that I ought not to extend it to personal estate, by holding that in this will the words "subject to the payment thereof of all my just debts," are to be treated as merely descriptive, and that the will is to be read as if they were omitted. The testator must be presumed to have been aware of the Act ; and it appears to me, that, by the words in question, he has taken pains to signify his intention, that, as between the devisees of the real estate and the residuary legatee of the personalty, the mortgage debt is to be borne by the personal estate.

I have not referred to the cases before other branches of

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the Court, because they were determined before Lord *Campbell's* decision. As far as they go, however, they adopt the view I have taken.

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DECLARE, that, according to the true construction of the testator's will, the mortgage debt and interest ought to be borne and paid out of his personal estate in exoneration of his real estate. Costs to be paid out of the general personal estate.

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 Nov. 18th & 19th.
 Bankruptcy—
 Partnership
 Deed—Part-
 ner's Interest in
 Mining Lease
 —Ceases of, on
 Bankruptcy—
 Fraud on Credi-
 tors.

8 Ch 646
 2 Ch D 340

WHITMORE v. MASON.

THIS suit was instituted by *William Whitmore* and others, as assignees in bankruptcy of one *James Herbert Smith*, a bankrupt, against *James Mason*, *Maria Herron*, *Joseph Tarratt*, and *Charles Barry*, who had been partners with *Smith* down to the time of his bankruptcy in working certain mines in *Portugal*; and the object of the suit was, to have the rights of the Plaintiffs ascertained so far as regarded the interest of the bankrupt under the deed of partnership.

A provision in a deed of partnership, that, in the event of the bankruptcy or insolvency of a partner, his share in a mining lease (forming part of the partnership property) shall go over to his co-partners, is void, as being in fraud of the bankrupt laws.

By the deed of partnership, which was dated the 30th of September, 1859, and made between the Defendant *Mason* of the one part, and the other Defendants and *Smith* of the other part, after reciting that a company called *La Sabina* had, in 1858, demised the mines to the Defendant *Mason* for a term of fifty years, subject to certain rents, royalties, and covenants, and that the parties to the deed had agreed to enter into a partnership for working the mines and for selling the produce; and reciting, that the mines and

premises were in fact so demised to *Mason* in trust for himself and the parties thereto of the second part, in the shares thereafter mentioned, and for the purposes of the partnership; and that, in pursuance of the agreement for the partnership, the parties to the deed had subscribed £6,500 as the capital to be employed in working the mines, and had paid the same into the Bank of *London*, to the credit of *Mason*, in the shares following—i. e., *Mason*, £3,000; *Maria Herron*, £1,500; *Tarratt*, £1,000; *Smith*, £500; and *Barry*, £500:—*Mason* covenanted to stand possessed of the mines and premises for the full term thereby granted, or for any renewed term thereof, in trust for himself and the parties of the second part, their respective executors, administrators, and assigns, in the shares and proportions thereafter expressed. And the parties mutually covenanted with each other, that they would continue copartners and joint adventurers for six years, for the purpose of working the mines, and for the sale of the produce; that the business of the partnership should be carried on in the name of *Mason* only; that the shares of the partners in the mines and premises, and in the effects and property to be held or connected therewith, and in all profits and losses which should be received or sustained in the prosecution of the mines, should be distributed and held in manner following, (that is to say), there should be considered to be thirteen shares therein, and *Mason* should be entitled to six, *Maria Herron* to three, *Tarratt* to two, *Smith* to one, and *Barry* to one of such shares; that the shares of the partners might be sold, mortgaged, or partially or absolutely disposed of to any copartner or other person whomsoever, and such copartner and other person should upon such sale or disposition become partners; provided that no such sale, mortgage, or disposition should be made without the previous consent in writing of all the other partners thereto. And it was thereby provided, that it should be lawful for the partners to withdraw from the

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partnership upon six months' notice to the copartners; and that upon such withdrawal an account should be stated of the profits and losses in respect of the share of such withdrawing partner, and of all that might be due from the partnership to him. And it was thereby expressly declared, that in taking such account the withdrawing partner should not be entitled to credit for the value or estimated value of the said lease, grant, or concession, or any renewal or extension thereof, but that such account should consist only of the share of such partner in the assets of the partnership other than the value of such lease, grant, or concession, subject to its liabilities, and of the share of the capital sunk in building or otherwise on account of the said mines debited to the capital account. And it was thereby declared, that the capital of the partnership should consist of the sum of £6,500, and of such other sums of money as the partners for the time being should from time to time think necessary, which said sums should be contributed by them according to their aforesaid or then respective shares and interests.

The deed then contained the following proviso, upon which the question turned:—"That, in the event of the bankruptcy or insolvency of any of the said present or future partners, an account shall be taken and a valuation made of the share and interest of such party in the said mines and premises (*except the value of the said recited lease, grant, or concession, or any renewal or extension thereof, which is not to be taken into account*), and the amount thereof paid to the parties entitled to receive the same, within twelve months next after such bankruptcy or insolvency."

In July, 1860, *Smith* committed an act of bankruptcy; and on the 30th of July, 1860, a petition for adjudication in bankruptcy was presented against him, and he was adjudged bankrupt. The Plaintiffs were appointed his assignees.

Disputes having arisen as to their rights under the partnership deed, the Plaintiffs now filed their bill, praying to have those rights ascertained and declared, and for an account and payment of the share or interest of the bankrupt in the partnership property at the date of his bankruptcy, irrespective of the value of the lease; and further praying, that a value might be set upon the lease at the date of the bankruptcy, and that the Defendants might be ordered to pay to the Plaintiffs one-thirteenth of such value.

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Statement.

Mr. W. Knox Wigram (in the absence of Sir Hugh Cairns, Q.C.) for the Plaintiffs :—

Argument.

The partnership deed provides, that, in the event of the bankruptcy or insolvency of any of the partners, an account shall be taken, and a valuation made, of the share and interest of such party in the mines and premises, "except the value of the said recited lease, grant, or concession, or any renewal or extension thereof, which is not to be taken into account."

This exception is void, as being an attempt to evade the rule in bankruptcy, which provides, that, upon an act of bankruptcy being committed, all the property of the bankrupt vests in his assignees. The effect of the exception, if valid, would be, that on the act of bankruptcy all the share and interest of the bankrupt would pass, not to his assignees, but to his surviving partners; and one of several co-partners cannot stipulate by the partnership deed, that upon his bankruptcy or insolvency his share and interest in any portion of the partnership property shall go over to his co-partners, without a fraud on the bankruptcy law: *Wilson v. Greenwood* (a), *Wilkinson v. Wilkinson* (b), *Rockford v. Hackman* (c).

(a) 1 Swanst. 481. (b) Geo. Cooper, 261. (c) 9 Hare, 484.

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The Plaintiffs, therefore, are entitled to have it declared, that the one-thirteenth share of the bankrupt partner in the lease, as well as in the other partnership property, passed to the Plaintiffs as his assignees in bankruptcy.

Mr. *Rolt*, Q. C., Mr. *Giffard*, Q. C., and Mr. *Southgate*, for the Defendants:—

We admit the claim of the Plaintiffs to the share and interest of the bankrupt partner in the partnership property other than the lease, and to have that share and interest ascertained by an account and valuation as provided by the deed of partnership. But, the claim of the Plaintiffs to the share of the bankrupt in the lease, we dispute.

By the partnership deed, the bankrupt's share in the lease is expressly excepted from the provision for the event of bankruptcy or insolvency, and the effect of that exception is to pass his interest in the lease to his co-partners. In this there is no fraud on the bankruptcy laws, nor any injury to creditors.

[The VICE-CHANCELLOR.—Is it not the principle of the bankrupt law that a man shall not limit his property for the benefit of himself until he becomes bankrupt, and, on his bankruptcy, then over? Here *Smith's* share in the lease is limited for the benefit of himself until he becomes bankrupt.]

Mr. *Rolt*.—This is a partnership deed, and the stipulations in partnership deeds are exceptional. A provision like the present is frequently inserted in such deeds, and we submit that it is valid. It is, in effect, no more than this:—The partner, who would otherwise have been joint-proprietor of the mining lease, stipulates with his co-partners that they shall be the exclusive proprietors, subject only to a proviso that up to the time of his becoming bankrupt or insolvent

he shall have an aliquot part of the yearly profits. Such a contract is neither directly nor indirectly an infringement of the bankrupt law. Still less can it be so where, as here, the property in question is not property of which the partner can be considered as a joint proprietor. In forming a partnership, each partner is making a bargain with the rest, and is entitled to stipulate for such advantages as he can obtain from the rest. Contributing his share to the common fund, he is entitled, in return, to stipulate, that, in the event of the others becoming bankrupt, their shares in any particular part of the partnership property shall not pass to their creditors, but shall remain the property of the partnership; just as in a demise of land the lessor stipulates that, in the event of the lessee becoming bankrupt, the lease shall determine, and the land revert to the lessor.

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[The VICE-CHANCELLOR.—Lord *Eldon's* opinion in *Wilson v. Greenwood* is strongly against your contention. That was merely a provision, that, on the bankruptcy of a partner, his share should be taken by the solvent partners at a sum to be fixed by valuation; yet Lord *Eldon's* opinion seems to have been, that even such a provision was void by the statutes concerning bankrupts. He says, "I have no doubt, whether on general principle or on the construction of the deed, that the law of this case is, that the partnership was dissolved by bankruptcy, and the property must be divided as in the ordinary event of dissolution without special provision" (a). The present is a much stronger case, for here the proviso is not, as in *Wilson v. Greenwood*, that the bankrupt's share shall be taken by the solvent partners at a sum to be fixed by valuation, but that it shall go over to them without payment.

In a note to that case, Mr. *Swanston* seems to have given the result of the authorities with his usual concise-

(a) 1 Swanst. 432.

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ness and accuracy. He says, "the general distinction seems to be, that the owner of property may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy; but cannot by contract or otherwise qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors. The *jus disponendi*, which for the first purpose is absolute, being in the latter instance subject to the disposition previously prescribed by law" (a).]

Mr. Giffard, Q.C.—All the decisions upon which that note is based, turned upon limitations in marriage settlements; and even in the case of such a limitation in a marriage settlement, it is now held, that the wife may be a purchaser *pro tanto*, i. e., to the extent of the amount the husband has received as her fortune upon the marriage. Thus, in *Lester v. Garland* (b), it was held that the limitations over in the event of the bankruptcy of the husband (who was himself the sole settlor) were good as to fifteen sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased. A limitation of this description in a deed of partnership is essentially different; and to such a limitation the rule, as stated by Mr. Swanston, is inapplicable. But, even as stated by Mr. Swanston, the rule would allow two co-partners, part owners of a mine, to limit their shares to each other until bankruptcy, and then over; and the limitation over would be valid. Here the Court is to consider each partner to have purchased, as it were, the shares of the rest, by contributing his own to the common fund, and thus to have acquired the *jus disponendi*—the right to dispose of such shares again, each to its original owner, subject to the condition of their reverting to the common stock in the event of his becoming bankrupt or insolvent.

(a) 1 Swanst. 481, n.

(b) 5 Sim. 205.

But, assuming the Court to be against us on this higher ground, still, the limitation being to take effect in the event of "bankruptcy or insolvency," in the alternative, it came into operation immediately the bankrupt partner became "insolvent," i. e., unable to pay his debts—consequently, before any act of bankruptcy under which his assignees could acquire a title.

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[The following cases were also cited:—*Roe dem. Hunter v. Galliers* (a), *Biddlecombe v. Bond* (b), *Parker v. Gosage* (c), and *Brooke v. Pearson* (d).]

The Court rose before a reply could be heard.

VICE CHANCELLOR SIR W. PAGE WOOD:—

Nov. 19th.
—
Judgment.

Since the rising of the Court yesterday I have considered this case, and examined the authorities upon the question which it raises; and I find it unnecessary to call for a reply.

It appears to me plain, both upon principle and authority, that the share of the bankrupt in the mines, as well as in the other partnership property, passed, on the act of bankruptcy, to the Plaintiffs as his assignees.

The partnership deed recites that certain mines were demised to the Defendant *Mason*, in trust for himself and the parties to the deed of the second part, in the shares and proportions thereafter mentioned; that, in pursuance of the agreement for the partnership, the parties to the deed had subscribed £6,500 in certain specified sums—*Smith*,

(a) 2 T. R. 133.

(b) 4 Ad. & Ell. 332.

(c) 2 Cr. Mee & Roscoe, 617

(d) 27 Beav. 181.

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who has since become bankrupt, subscribing £500 (or one-thirteenth of the whole capital); and that the payments so made are to be treated as their respective shares in the partnership. And then there is the proviso upon which the question arises, viz. "That in the event of the bankruptcy or insolvency of any of the said present or future partners, an account shall be taken and a valuation made of the share and interest of such party in the said mines and premises (except the value of the said recited lease, grant, or concession, or any renewal or extension thereof, which is not to be taken into account), and the amount thereof paid to the parties entitled to receive the same within twelve months next after such bankruptcy or insolvency."

Now, I apprehend that the law is too clearly settled to admit of a shadow of doubt, that no person possessed of property can reserve that property to himself until he shall become bankrupt, and then provide, that, in the event of his becoming bankrupt, it shall pass to another, and not to his creditors.

But it was argued, that the case of a partnership is exceptional; that, in forming a partnership, each partner is making a bargain with the rest, and has a right to stipulate for such privileges as he can obtain; that, by contributing his share to the common fund, and thereby giving the advantage of that share to the other persons entering into the partnership, he acquires the right to stipulate, that, in the event of the others becoming bankrupt, their shares shall not pass to their creditors, but shall remain the property of the partnership. And it was said, that the case resembled the ordinary condition in a demise of land, that, in the event of the tenant becoming bankrupt, the land shall revert to the landlord.

The principle upon which such a condition as last mentioned has been upheld in the case of a demise of land, is

expressed in the maxim, "Cujus est dare ejus est disponere." The question is, whether that principle is applicable to a partnership deed of this description.

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—
Judgment.

It is argued that it is : that I am to consider each partner to have purchased, as it were, the share of the rest by thus contributing his own to the common fund, and to have thereby acquired the right to dispose of such shares again, each to its original owner, subject to the condition of their reverting in the event of bankruptcy.

Consistently with the authorities, it seems to me impossible to hold that this can be done. It is true, that in all the authorities cited the consideration upon which the question has arisen, has been that of marriage ; yet no one can deny that the consideration of marriage is quite as substantial as the shares which, in this case, each of the partners contributed to the common fund. And if the consideration of marriage has been held insufficient to support such a stipulation, upon the ground that you cannot withdraw any advantage available for your creditors in the event of bankruptcy, that reason would apply equally to a case of this description.

The rule is clearly laid down by Lord *Eldon*, in the case of *Higginbotham v. Holme (a)*, that no one can be allowed to derive benefit from a contract that is in fraud of the bankrupt laws. That case was the stronger, because the husband was not in trade at the date of the settlement. On the contrary, he intended to take holy orders ; and it was only contemplated that he might change that intention and become a trader. The wife's father had entered into some covenant, which the reporter has not distinctly stated, for

(a) 19 Ves. 88.

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the benefit of the husband (a) ; and with reference to that covenant Lord *Eldon* said, "As to the consideration from the covenant of the father . . . though, undoubtedly, an annuity might have been provided by the settlement for the wife in all events ; yet it is not competent to a party giving a consideration for a contract that is a direct fraud upon the bankrupt laws, to have the benefit of it."

Looking at all the cases in which a limitation over in the event of a husband's bankruptcy has been supported to the extent of the money received from the wife, I take the principle of the decisions to have been, that where there is a covenant on the part of the husband to settle a definite sum of money, say £10,000, and the husband has received another definite sum, say £5,000, as the wife's fortune, the Court has treated £5,000 of the £10,000 as if it were identically the wife's money, and has set it off accordingly. That is the case of *Lester v. Garland* (b). And so, in all other cases where the Court can find a definite sum which can be appropriated as the wife's property, it regards it not as the consideration she gives for the rest, but as the identical property which she contributed as her fortune upon the marriage.

Nothing of that sort can be done in the case of a partnership like the present. The Court cannot estimate the value of the contingency which the bankrupt partner gave up by contributing his share in the lease to work the mines. If his co-partners had advanced a definite sum of money on

(a) On referring to the Registrar's Book, it appears that a covenant had been entered into by the wife's father, under which some fortune was to come to the husband. In the entry of the decree the order is expressed to be without prejudice to the Plain-

tiff *Sarah Higginbotham*, claiming "any lien on her father's property he has covenanted to give her husband, upon the death of the father." Reg. Lib. A. 1811, fol. 1209.

(b) 5 Sim. 205.

account of his share, then the property might have been considered, to the extent of the money so advanced by them, as identically their money; but this has not been done.

It was argued, that, the limitation being to take effect in the event of "*bankruptcy or insolvency*"—in the alternative, it took effect in this case immediately the partner was unable to pay his debts, and consequently before any act of bankruptcy under which his assignees could claim. But it would be impossible to allow that argument to prevail. A bankrupt is usually insolvent before he commits an act of bankruptcy. First he becomes insolvent, and then bankrupt; and if that construction were to prevail, the bankrupt laws might, in all cases, be defeated. Besides, I observe that in several of the cases before Lord *Redesdale*, the limitation is worded in the same alternative form, to take effect in the event of "*bankruptcy or insolvency*."

As regards the lease, therefore, I am bound to declare that the share of the bankrupt partner has passed to the Plaintiffs as his assignees in bankruptcy. The value of that share will have to be ascertained by sale, because as to the lease the deed contains no provision for valuation.

As regards the remaining partnership assets, the deed provides that there should be an account or valuation. If the Plaintiffs are content to abide by a valuation, it will not be necessary for me to determine the question—as to which there was some doubt in *Wilson v. Greenwood*—whether there ought not to be a sale instead of a valuation. But if they insist upon a sale of the assets other than the lease, I must hear a reply in support of that part of their claim.

[Mr. *Wigram* declined to argue the point.]

The VICE-CHANCELLOR.—Then, as regards the share of the bankrupt partner in the assets other than the lease,

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 Judgment.

I shall direct an account and valuation. Where there is a bona fide intention to secure the going on of the concern, by the other parties handing over to the creditors all that the creditors ought to take, I cannot conceive there is any fraud on the bankruptcy laws.

Minute of
 Decree.

DECLARE, that the one-thirteenth share of the bankrupt partner in the lease in the pleadings mentioned passed to the Plaintiffs as his assignees under the bankruptcy.

DECLARE, that an account and valuation ought to be taken and made of the share and interest of the bankrupt in the partnership property other than his share in the lease, up to the date of the act of bankruptcy; and that what (if anything) shall be due on taking that account, passed to the Plaintiffs as his assignees.

DIRECT an inquiry as to the date of the act of bankruptcy.

RESERVE further consideration and costs.

8 GR 586

1861,
 Dec. 12th;
 1862,
 Jan. 14th.

HANCE v. TRUWHITT.

A SPECIAL CASE.

Will—Con-
 struction—
 After-acquired
 Lands—7 Will.
 4 & 1 Vict.
 c. 26, ss. 24 &
 34—Election—
 Heir.

A devise before
 1838 of all my
 freehold hereditaments, and all my goods, chattels, "and generally all other my real and personal estates and effects whatsoever . . . whereof I, or any person or persons in trust for me, am, is, or are, or shall or may be seised or possessed:"—Held, to put the heir to his election as to after-acquired lands.

George Truwhitt, by his will, dated the 30th of December, 1837, after directing his debts, funeral and testamentary expenses to be paid, and giving certain pecuniary legacies, proceeded to devise as follows:

The authorities on election by the heir under such a devise reviewed.

"As to all and every my freehold, copyhold, and leasehold, messuages, lands, tenements, and hereditaments, and all and every my stocks, funds, moneys, annuities, securities for money, debts, goods, chattels, and generally all other my real and personal estates and effects whatsoever and wheresoever, and of what nature, kind, or quality soever the same may be, whereof, wherein, or whereto I, or any person or persons in trust for me, am, is, or are, *or shall or may* be seised, possessed, interested, or entitled in possession, reversion, remainder, or expectancy, or otherwise howsoever, I give, devise, and bequeath the same and every of them, and every part thereof, and all my estate and interest therein (after and subject, as to my personal estate, to the payment of my just debts and funeral and testamentary expenses, and the legacies hereinbefore bequeathed) unto and to the use of *William Yewd and Charles Hennell*" (since deceased, and now represented by the Plaintiffs), "their heirs, executors, administrators, and assigns, upon the trusts hereinafter declared." The testator then directed his trustees to stand seised and possessed of the trust premises, upon trust to pay thereout an annuity to his wife, and subject thereto in trust for all his children as tenants in common.

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HANCE
v.
TRUWHITT.
Statement.

The testator died in 1860, leaving the Defendant, *Charles Truwhitt*, his eldest son and heir-at law, and two daughters, him surviving.

In the interval between the execution of his will and his death, the testator acquired divers freehold estates, to which the Defendant *Charles*, as his heir-at-law, claimed to be entitled in equity as well as at law.

The questions in the special case were—

1. Whether the real estates acquired by the testator between the date and execution of his will and the day of his death, descended to his heir-at-law beneficially?

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 v.
 TRUWHITT.

Statement.

Argument.

2. Is the heir-at-law bound, under the will, to elect whether he will take such last-mentioned real estates, or whether he will accept his interest under the will?

Mr. Rolt, Q.C., and Mr. Horwood, for the Defendant, Charles Truwhitt, the heir-at-law:—

The will, being executed before the 1st of January, 1838, could not pass real estates acquired by the testator subsequently to its execution (a). The answer, therefore, to the first question must be, that the real estates acquired by the testator between the date and execution of his will and the day of his death, descended to his heir-at-law beneficially.

The only question to be determined, then, is the second—whether, upon the terms of the will, the heir-at-law is bound to elect between such after-acquired real estates and his interest under the will.

We contend, that, according to the true construction of the will, the heir-at-law is not put to his election. To raise a case for election, there must be “demonstration plain—necessary implication: meaning by that the utter improbability that the testator could have meant otherwise;” and “it rests upon those contending for a case of election, to show that there is that manifest plain demonstration and utter improbability:” per Lord Eldon, in *Randliffe v. Parkyns* (b). “The heir-at-law is not to be disinherited unless by express words or necessary implication—that is to say, by a will clearly indicating the intention of the testator to leave his property to some one else:” per Lord Campbell, C., in *Hall v. Warren* (c). Here there are no express words, nor is there necessary implication. Every word in the will can be satisfied without construing the

(a) 7 Will. 4 & 1 Vict. c. 26,
 ss. 24 and 34.

(b) 6 Dow, 179.

(c) Dom. Proc. 10 W. R. 67.

devise so as to include after-acquired real estate. It is true, the devise is in terms general and universal, but "the generality, the mere universality, of a gift of property is not sufficient to demonstrate, or create a ground of inference, that the giver meant it to extend to property incapable, though his own, of being given by the particular act:" per *Knight Bruce*, L. J., in *Maxwell v. Maxwell* (a). "A designation of the subject intended to be affected by an instrument, in general words, imports *prima facie* that property only upon which the instrument is capable of operating:"—per Lord *Cranworth*, L. J., in *Maxwell v. Maxwell* (b). The Court will not assume, from the mere generality of the devise, that the testator, in making it, contemplated an act which was contrary to the Statute of Wills, and consequently void at law.

1861.
HANCE
v.
TRUWHITT.
Argument.

The only expression upon which the devisees can rely as raising a case for election, is contained in the words "*shall or may* be seised, possessed, interested, or entitled." But this does not necessarily imply futurity. It is a use of the future for the subjunctive, and the effect is simply to give the idea of indefiniteness and generality. Even if used in a future sense, the words may be satisfied by referring them exclusively to the testator's personal estate. The gift is of a mixed fund, consisting of personal as well as real property, and may be construed, *reddendo singula singulis*, thus: "real estate whereof I, or any person or persons in trust for me, am, is, or are seised; personal estate whereof I or any person or persons in trust for me shall or may be possessed."

And not only may the words of the will be satisfied without construing them to include after-acquired real estate, but they cannot be satisfied if they are so construed; for the words are, "all and every *my* freehold lands . . .

(a) 2 D. M. & G. 713.

(b) *Ibid.* p. 715.

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 TRUWHITT.
 —
 Argument.

and generally all other *my* real estate." The testator describes the lands he means as already his at the date of the will. That description could not include what were then the property of other persons. He must clearly have meant all that he then possessed, and was capable of passing by his will—as if he had said, "All that is now mine and shall continue to be mine till my decease—all such of my present estate as I shall die possessed of."

But, in fact, the case is governed by authority. In *Back v. Kett* (a) the testator desired his executors to sell "whatever real estates he might die possessed of"—words far stronger than any in this will, where there is no reference to his decease; yet Sir *Thomas Plumer*, M. R., held, that, as those words might mean "all which the will could operate upon—that is, all which the testator then had, and which he should continue to have at his death," the Court was not warranted in extending the devise to after-purchased lands, and putting the heir to his election. In *Johnson v. Talford* (b), the words in the will appear to have been precisely the same as here; yet Sir *John Leach*, M. R., held that they did not extend to after-acquired lands. Those authorities are conclusive.

[The VICE-CHANCELLOR.—*Churchman v. Ireland* (c) appears to have been decided subsequently to *Johnson v. Talford*.]

Mr. *Rolt*, Q. C.—In *Churchman v. Ireland* the words were, "which I shall die possessed of"—words which do not occur in this will.

[They cited also *Lushington v. Sewell* (d), and *Allen v. Anderson* (e).]

(a) Jac. 534.

(b) 1 R. & My. 244.

(c) 4 Sim. 520; S. C., 1 R. & My. 250.

(d) 1 R. & My. 169.

(e) 5 Hare, 163.

Mr. Willcock, Q. C., and Mr. Keene, for the testator's daughters :—

1861.
HANCE
v.
TANWHITT.
Argument.

We admit that the first question must be answered in the affirmative ; but we contend, that, according to the true construction of the will, there was a plain intention on the part of the testator to pass after-acquired real estate, and, therefore, that the heir is bound to elect.

Back v. Kett is no longer binding as an authority. It was opposed to *Thellusson v. Woodford* (a). It is inconsistent with *Churchman v. Ireland* (b), where, as here, the words were “my real estate ;” and after *Schroder v. Schroder* (c), it must be considered as overruled, Lord Cranworth, C., having there described it as “a very unreasonable construction, affecting to understand the words of the will in a sense which every person must know was not intended by the testator” (d).

In this will, if the words “at my decease” had followed the words “shall or may,” the case would have been on all fours with *Churchman v. Ireland*. The omission of those words does not affect the construction ; the expression “shall or may” pointing equally to a future time, whether “at my decease” be added or omitted ; and it would be as unnatural a construction here, as Lord Brougham held it to be in *Churchman v. Ireland*, to construe the words, reddendo singula singulis, as referring exclusively to personal estate.

Mr. Rolt, Q. C., in reply :—

Even if the words “shall or may” are to be construed as words of futurity, and as referring to real estate equally with personal estate, they may be satisfied without treating them as pointing to the after-acquired lands in question.

- | | |
|--------------------------------|----------------------------------|
| (a) 13 Ves. 209. | (c) Kay, 578 ; S. C., on appeal, |
| (b) 4 Sim. 520 ; S. C., 1 R. & | 24 L. J., N. S., Ch. 510. |
| My. 250. | (d) Ibid. 511. |

1861.
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 —
Argument.

The testator might contemplate parting with lands after the date of his will; or he might contemplate the possibility of taking a conveyance to himself of the legal estate in lands, which, at the date of the will, were vested in trustees in trust for him; or he might contemplate that lands, which at the date of his will were vested in one trustee, might afterwards, by a change of trustees, become vested in another. Construing the will as intending to provide for these contingencies, all the words the testator has used are satisfied without reference to after-acquired land; and upon no other construction are they satisfied, for after-acquired land could not be described as his already.

Cur. adv. vult.

1862.
 Jan. 14th.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The two questions in this special case are in substance reduced to one, for, as the will was made before the recent Wills Act (a) came into operation, it could not have the effect of passing real estates acquired by the testator after the execution of his will. Such real estates, therefore, descended to his heir-at-law beneficially; and the only question to be determined is, whether there is in the will such an indication of an intention on the part of the testator to pass real estates which he might acquire after the execution of his will, as to put the heir to his election.

It was argued on behalf of the heir, that there was not such an indication of intention; that the mere universality of the terms in which the testator has described the subject matter of the devise, is not sufficient to indicate that he

(a) 7 Will. 4 & 1 Vict. c. 26, ss. 24, 34.

intended thereby to pass what, according to the then law, it was not competent to a testator to pass by devise; and reliance was placed upon the rule of construction enunciated by Lord Justice *Knight Bruce* in *Maxwell v. Maxwell* (a), that "the generality, the mere universality, of a gift of property is not sufficient to create a ground of inference that the giver meant it to extend to property incapable, though his own, of being given by the particular act:" and by Lord *Cranworth*, L. J., in the same case, "that a designation of the subject intended to be affected by an instrument, in general words, imports *prima facie* that property upon which the instrument is capable of operating."

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HANCE
v.
TRUWHITT.
Judgment.

In *Maxwell v. Maxwell*, however, Lord *Cranworth* expressly admits that the rule would not apply to a case where the instrument, upon the face of it, appeared intended to operate on other property; as where property which could not pass is expressly denoted, which was the case, he says, in *Brodie v. Barry* (b).

The question, therefore, is whether the real estates acquired by the testator after the execution of his will are sufficiently denoted upon the face of this will.

Now, whatever doubt there might have been upon that question before Lord *Brougham's* decision in *Churchman v. Ireland* (c), the law is so settled by that decision, that it is impossible for this branch of the Court to depart from the doctrine there established, by holding that after-acquired real estates are not sufficiently denoted upon the face of this will. No substantial distinction can be taken between the words of the will in *Churchman v. Ireland* and those of the will before me. It is true, that the will in *Churchman v. Ireland* contained the words "which I shall *die* possessed of, interested in, or entitled to," and

(a) 2 D. M. G. 705.

(b) 2 Ves. & Bea. 127.

(c) 1 R. & My. 250.

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 HANCE
 v.
 TRUWHITT.
 Judgment.

that similar words are not found in the will before me; but every argument which in the case before me has been urged on behalf of the heir, applied and was urged with equal force on behalf of the heir in *Churchman v. Ireland*. There, as here, the term "my" was used, the words being "all and singular *my* estates and effects . . . both real and personal, which I shall die possessed of, interested in, or entitled unto," which, it was argued, must refer to such estates only as the testator was possessed of at the time when the will was made, and which should continue in his possession down to the period of his death—as if he had said "all my estates which, being now mine, shall continue to be mine till my decease;" since estates which he did not possess could not be indicated by the words "all and singular *my* estates and effects." There also, as here, the gift was of a mixed fund, "all and singular my estate and effects . . . both real and personal," from which it was argued that the prospective words would be satisfied by confining their application to the testator's personal estate. Yet Lord Brougham held, that the words must be understood as looking forward to the whole of the lands which the testator might possess at his decease, including what he might acquire after the execution of his will.

Previously to *Churchman v. Ireland* (a) Lord Erskine had decided in *Theellusson v. Woodford* (b) that a devise of lands which the testator should thereafter contract to purchase would put the heir to his election; but in *Churchman v. Ireland* the devise was simply of all the testator's estates and effects, both real and personal, which he should die possessed of.

In the interval between *Theellusson v. Woodford* and *Churchman v. Ireland*, Sir Thomas Plumer, M.R., de-

(a) 1 R. & My. 250.

(b) 13 Ves. 209.

cided in the case of *Back v. Kett* (a), (where, I must admit, the words were very similar to the present), that a direction in the will for the executors to sell "whatever real estates the testator might die possessed of," did not extend to after-purchased lands so as to put the heir to his election. He says: "The direction may mean all which the will could operate upon; that is, all which the testator then had, and which he should continue to have at his death"—the very interpretation for which the heir in this case contends. But the answer is, first, as was observed by Lord *Cranworth*, that this was a very unnatural and strained construction of the words of the will; and secondly, that, even if it were correct, the words in the will before me being in the alternative form "am or shall be," are distinguishable, the word "or" clearly showing, as Lord *Cranworth* observed in *Schroder v. Schroder* (b), that the testator was contemplating two different descriptions of estates—those which were then his, and those which, not being his then, should be his at the time of his decease.

In *Schroder v. Schroder* (c), there was no mixed fund of real and personal estate. In deciding that case I followed *Churchman v. Ireland* (d), by which I conceived myself to be bound. On appeal, my decision was affirmed by Lord *Cranworth*. There the words were "all my real estates whatsoever and wheresoever, of or to which I now am, or at the time of my decease shall be, seised or entitled." In affirming that case, Lord *Cranworth* reviewed all the authorities of importance. "The case mainly relied upon," he says, "was that of *Back v. Kett* (e). I do not adopt the construction which the Master of the Rolls put upon the words in that case. I think that it was a very unreasonable construction; it was affecting to understand the

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HANCE
v.
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Judgment.

(a) Jac. 534.

(c) 1 Kay, 578.

(b) 24 Law J., N. S., Ch. 510.

(d) 1 R. & My. 250.

(e) Jac. 534.

1862.
 HANCOCK
 v.
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 —
Judgment.

words of the will in a sense which every person must know was not intended by the testator. But, whether that decision was right or wrong, all I can say is, that the words in the present case are not the same as there. If they were the same, then it might have been a question, whether I would have overruled or followed that decision. The next case relied on was *Johnson v. Telford* (a). In that case, Sir J. Leach thought that the direction that the heir-at-law should convey, did not refer to estates which he had contracted to purchase, but which had not been conveyed to him. I do not give any opinion upon that case, but it is manifestly different from this case. So in *Tennant v. Tennant* (b), with all deference to Lord Plunkett who decided that case, the construction he put upon the words was not that which I would have put upon them; still, were the language here precisely similar to what it was there, I might have been guided by the authority, rather than throw doubt upon the law as settled by decision. But the question in the present case is not open to such doubts. How can any one doubt that the testator contemplated all the property of which he should afterwards become possessed? The view I take of this case is confirmed by the decision of the late Vice-Chancellor of England in *Churchman v. Ireland* (c), which was affirmed by Lord Brougham, on appeal (d). I do not say that my construction is confirmed by the case of *Thellusson v. Woodford* (e), for there there could have been no possible doubt as to the construction. Upon the first point, therefore, I think it clear that this testator meant by these words to devise, not only the estates he was seised of at the date of his will, but also such estates as he might afterwards acquire."

(a) 1 R. & My. 244.

(c) 4 Sim. 520.

(b) Lloyd & G. temp. Plunkett, 516. (d) 1 R. & My. 250.

(e) 13 Ves. 209.

In *Johnson v. Telford* (a) there would seem to have been in the will words very similar to those before me ; but in that case no reference appears to have been made to the words in the will ; the whole argument turned upon the words in the codicil :—" If it shall happen that any hereditaments *purchased* by me at any time or times should happen to be conveyed after the date and publishing hereof:" expressions which Sir *John Leach*, M.R., held to refer, not to estates *purchased* after the codicil, but to estates already purchased, which should happen to be *conveyed* after the codicil. It does not seem to have occurred to any one that the words of the will in that case might have had a greater effect. In the report, the words of the will are in the third person ; but if I may venture to turn them into the first person, they will run thus—"all and every my real and personal estate, whatsoever and wheresoever, which I or any persons in trust for me are, or am, or *shall be* seised or possessed of"—words certainly very similar to those in the will before me. But the answer is, that the words in the will do not appear to have been adverted to in the argument of that case.

1862.
 HANCE
 v.
 TRUWHITT.
 Judgment.

The question is brought to this :—Can I hold that the omission in the will before me of the words "at my decease," makes any substantial difference between the present will and that which was in question in *Churchman v. Ireland* ? I feel that I cannot. Nothing can be more mistaken than to draw refined and nice distinctions upon words, which when any degree of logical consideration is applied to them are found not to import the slightest difference of idea. Here the testator is giving all that he is, or shall, or may be seised of ; and the words he has used are equally future, whether the expression "at my decease" be added or omitted.

It was argued, that the words "shall or may be" do not

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 HANCE
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 Judgment.

necessarily imply futurity, and may be simply used indefinitely—a sort of use of the future for the subjunctive mood, if one may so express it. I cannot adopt that reasoning. The meaning of the words must be obvious. They are plainly words of futurity, applying equally to realty or personalty, and not to be construed, *reddendo singula singulis*, as applicable exclusively to the personalty, for that construction was expressly rejected in *Churchman v. Ireland* (a), but as applicable equally to both realty and personalty.

It was argued that the testator might have, "at the date of his will, lands of which (though his in equity) some other person might then be seised at law in trust for him, and he might contemplate that between the date of his will and his death he might take a conveyance to himself of the legal estate in such lands—in which case they would be aptly described by the words "my real estates of which I shall or may be seised;" and in one sense, no doubt, the words of futurity might be satisfied in that way. Or, again, he might contemplate that what at the date of his will was vested in one trustee might afterwards become vested in another person as trustee for him, which in a sense would satisfy the words "my real estates of which any person or persons in trust for me shall or may be seised." I feel there is a degree of cogency in all these arguments, but every one of them would apply equally if the words "at my decease" had been added; and had words to that effect been added, the case would have been brought precisely within the authority of *Churchman v. Ireland*. In *Schroder v. Schroder* the very same arguments were actually urged; but it was held, that, words of futurity being clearly used, the Court was not to be astute to discover some possible sense by which their natural signification could be evaded.

(a) 1 R. & My. 250.

I feel bound to follow my decision in that case—affirmed as it has been by a Court of higher judicature—and to hold, that the real estates acquired by the testator between the date of the execution of his will and the day of his death descended to his heir-at-law beneficially; and that the heir is bound to elect whether he will take such last-mentioned real estates, or whether he will accept his interest under the will.

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HANCE
v.
TRUWHITT.
Judgment.

The difficulty being caused by the will, the costs in either case will come out of the estate.

Decreed accordingly.

92 R 2. 257 —◆—
LR 289 232
LR 162 240
" 362 584

RE PHOENIX LIFE ASSURANCE COMPANY.

HOARE'S CASE.

March 13th.
Winding-up.—
Contributory—
Trustee.

THIS was an adjourned summons on the part of the official manager of the company to strike out a qualification annexed by the Chief Clerk to the names of Messrs. J. W. Hoare, D. H. Young, and H. G. Hoare, who were placed on the list of contributories; the contributories contending, on the other hand, that their names ought to be removed altogether.

The deed of settlement of a company provided, that no deed of transfer should be deemed complete, and no person should be registered as a shareholder until he had executed the deed of settlement; and that the company should not be bound to recognise equitable title, but

The facts as admitted were as follows:—

The company was constituted by a deed of settlement of the 5th of May, 1848, and was ordered to be wound up on

that the persons to whom shares should be legally assigned should be considered the absolute assignees.

Certain shares were settled, and a notice of transfer to the trustees was duly given to the company by the settlor. The trustees never executed the deed of settlement of the company, and no transfer deed was ever executed; but the names of the trustees were registered and retained as shareholders, with the word "trustees" added in the margin. They also gave receipts for dividends as trustees:—*Held*, that they were liable as contributories to the full extent, and that they could not be put on the list as trustees liable only to the extent of the trust estate.

1862.

RE PHENIX
LIFE ASSUR-
ANCE COM-
PANY.

HOARE'S CASE

Statement.

the 14th of April, 1860. *Maurice Evans*, the secretary of the company, executed the deed of settlement for 40 shares on the 16th of June, 1852, and on the 18th of July, 1854, was registered as the holder of 160 further shares. By the marriage settlement of *Evans*, dated the 28th of April, 1857, it was recited that the said shares had been transferred to *J. W. Hoare*, *D. H. Young*, and *H. G. Hoare*, and trusts were declared thereof for the benefit of the wife and children. On the 12th of May, 1857, a written notice, addressed to the directors by the solicitors of *Evans*, was entered in the transfer book, stating that six policies on the life of *Evans* were assigned by deed, dated the 28th of April, 1857, to *J. W. Hoare*, *D. H. Young*, and *H. G. Hoare*, upon the trusts therein expressed; and that *Evans* was desirous that his shares should be transferred into the names of the said *J. W. Hoare*, *D. H. Young*, and *H. G. Hoare*, as the owners thereof, and requesting the directors to make such transfer accordingly.

There was no formal deed of transfer executed; but an entry was made in the register of shareholders, with respect to these shares, under date 31st July, 1857, containing under the head "name of shareholder" the names *J. W. Hoare*, *D. H. Young*, and *H. G. Hoare*, with the word "trustees" written in the margin, and containing under the head "nature of charge" the word "transfer." There was also a subsequent entry in respect of the same shares, where, under the head "name of shareholder," was written "*Hoare, J. W., and others, trustees of Mrs. M. Evans.*"

The transfer book contained an entry under date 12th May, 1857, where the name of *Maurice Evans* was entered as transferor of the first-mentioned shares, and the names of *J. W. Hoare*, *D. H. Young*, and *H. G. Hoare*, as transferees, no qualification being added.

Messrs. *Hoare, Young, and Hoare* did not execute the

deed of settlement, but they received and gave receipts for dividends or interest as trustees, upon the warrants being forwarded to them by the directors. The interest warrants and receipts up to the 31st January, 1858, were in the following form :—Half-yearly interest to the 31st January, 1858, at 6 per cent.

1862.
RE PHOENIX
LIFE ASSUR-
ANCE COM-
PANY
HOARE'S CASE
—
Statement.

SHARES.	INTEREST.
200 at £5.	£30.
Pay to <i>J. W. Hoare</i> , Esq., and others, trustees, in- terest due as above. <i>M. Evans</i> , Registrar.	Received as above, 8th of July, 1858. <i>H. G. Hoare</i> , for self and co- trustees.

The two subsequent warrants and receipts were similar, except that in one of them the warrant ran "pay to trustees of *M. B. Evans*," and the receipt was signed "for the trustees, *J. W. Hoare*." The only return to the Registration Office which contained the names of *Hoare*, *Young*, and *Hoare*, was made on the 3rd of March, 1858; and in that the three names were entered, in the return of changes in the list, with the words "as trustees" appended, and in the list of shareholders the entry was "*Hoare*, *J. W.*, and others, trustees for *Mrs. M. Evans*." The Chief Clerk had placed Messrs. *J. W. Hoare*, *D. H. Young*, and *H. G. Hoare*, on the list for 200 shares, with the following qualification, "as trustees for *Mrs. Evans*, a member or contributor in her own right, to the extent of their trust estate."

The following clauses of the deed of settlement were referred to :—

"69. That every person who shall have agreed for the sale of any share or shares held by him or her in the said company, shall give notice thereof in writing, at the office of the said company, of such his or her desire; and shall describe in such notice the number of shares intended to be

1862.

RE PHENIX
LIFE ASSUR-
ANCE COM-
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HOARE'S CASE.

—
Statement.

by him or her sold, and the name and place of abode of the person or persons purchasing the same; and that, after such notice duly given, any person desirous of selling or transferring such shares, shall be at liberty to transfer the same to such purchaser or purchasers without delay.

“73. That the names and addresses of all the shareholders, with the aggregate and distinctive numbers of shares held and instalments paid on them, and every change therein and addition thereto, shall be kept by the directors, and entered by the secretary in a book to be kept for that purpose, and to be called the Register of Shareholders.

“74. That no deed of transfer shall be deemed complete, nor shall any person be registered as a shareholder under any such deed, or any other manner whatever, until such person shall have bound himself or herself to abide by the covenants and agreements herein contained, either by executing these presents a deed of covenant to be prepared at his or her own expense referring thereto, as the directors shall from time to time direct; and all shares remaining three years without an owner so registered, shall be absolutely forfeited to the company for the benefit of the other shareholders,

“76. That in all cases where any shares in the capital of the company shall be assigned or bequeathed to, or otherwise vested in, any person or persons in trust for any person or persons, the company shall not in any respect be bound or concerned to recognise or admit the equitable title of the person or persons beneficially entitled to the said shares; but the person or persons to whom such shares shall be legally assigned or bequeathed shall be considered the absolute assignee or assignees or legatee or legatees of such shares, and shall, previously to his, her, or their admission as a shareholder or shareholders, produce and leave for inspection at the office of the secre-

tary or clerk of the company the deed or probate or letters of administration, or office extract or copy of the will or administration, under which he, she, or they shall claim."

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Sir *H. Cairns*, Q. C., and Mr. *Fry*, for the official manager :—

It is settled, that defects in the mode of transfer will not relieve a contributory who has taken the benefit of shares by receiving dividends. It is also clear from the deed, that a trustee was to be regarded as the actual shareholder ; and the marginal note in the register, if it was anything more than matter of description, was altogether beyond the powers of the directors. They could not register a shareholder as trustee only. The Chief Clerk was therefore wrong in treating the cestui que trust as a contributory and in qualifying the liability of the trustees : *Fenwick's case* (a), *Luard's case* (b), *Price and Brown's case* (c), *Burlinson's case* (d).

Mr. *Kay* for the creditors' representative.

Mr. *Roxburgh* (Mr. *Rolt*, Q. C., with him) for the alleged contributories :—

We ought not to be on the list at all. *Evans* was regularly the holder of these shares, which have never been taken out of him. There was a notice, but no transfer nor any instrument executed by the trustees. There was no power in the company to put them on the register.

The only cases in which receipt of dividends has been

(a) 1 De G. & Sm. 557.

(c) 3 De G. & Sm. 146.

(b) 1 De G. F. & J. 533.

(d) 3 De G. & Sm. 18.

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held to waive defects of transfer are those where the transferee takes the dividends for his own benefit. The mere act of receiving as a trustee will not have this effect.

In *Fenwick's case* the trustee was quæ the company the absolute owner, they knowing nothing of any arrangement as to the disposal of the dividends. In *Luard's case* the liability attached to the husband only by reason of his wife having been liable. If the official manager is right in this case, every banker who receives dividends for a customer would be liable as a shareholder.

There is nothing to show that these trustees ever knew that their names had been put on the register; and they had a right to assume that they were not so, inasmuch as they had never executed a transfer, or agreed to accept the shares in any way. The form of the dividend warrant would not convey this information. *Hall's case* (a) is precisely in point.

Moreover, there was nothing in the deed to prohibit the company from taking notice of a trust (as they have done), though they were not bound to do so. Therefore, at any rate, the qualification must remain.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I am of opinion that the entry proposed by the Chief Clerk cannot stand. There can be no alternative but to place the names of the trustees on the list without qualification, or else to put the name of the cestui que trust on instead. A person who is a shareholder is absolutely liable, although he may be bound to apply the proceeds of the shares upon a trust. The case is not the same as that of an executor who may be a contributory, as representing his

(a) 1 Mc. & G. 307.

testator's estate. A trustee becomes the holder of the trust estate with all its consequences, and, if a shareholder at all, is liable without qualification, though without prejudice, of course, to any right of indemnification which he may have against his cestui que trust. Therefore, whether these gentlemen are described as trustees or not, they will be liable to the full extent if they are to be regarded as shareholders at all. I think that in this case the liability of shareholders does attach. The distinction between *Hall's case* and the present is clear. It has been settled over and over again that if there has been any irregularity, as, for example, the non-execution of a proper transfer deed, it does not lie in the mouth of any person who has received dividends or other benefits from the shares to set it up. The only question is, whether these gentlemen received dividends as shareholders; and I am of opinion that they did. They knew that there was a settlement of the shares under which they were entitled to be regarded as the proprietors. They held no communication with the company, and did not inform the company, as *Hall* did, that they received the dividends for any other person. They received the dividends in regular course, the warrants being sent to them by the directors in a form in which, with the exception of one warrant, no name of a cestui que trust appeared, and they gave receipts signed by one, either "for self and co-trustees," or "for the trustees."

The dividend warrants, which would properly be sent to shareholders, being made payable to them as trustees, and the receipts being given as trustees, amounted to a representation, acquiesced in and acted on by them, that they were shareholders upon trust, and not mere agents, as bankers might be, to receive the money for the real shareholders.

Their names were put upon the register as shareholders, and the word "trustee" which was added only indicated that they were the legal owners of the shares, though without a

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beneficial interest in them. That is the circumstance which distinguishes this from *Hall's case*. There Lord *Cottenham* came to his conclusion on the very singular facts before him. The shares there were returned in various ways—on several occasions as belonging to a former shareholder, *A. Outerston*, though he was then dead; on another to *Elizabeth Outerston*, who was the widow and executrix; then again to the dead man himself; afterwards to *A. Outerston's* executors; then to *A. Outerston's* trustee; and lastly to "*Elizabeth Outerston, executrix of A. Outerston, J. Hall appointed as trustee to Elizabeth Outerston.*" It would have been difficult to say that this amounted to a return of *Hall* as the owner. The widow was entered as the owner, and the fact of the appointment of *Hall* as trustee was mentioned in addition.

The receipts were mostly signed "for the executors *J. Hall*," or in some equivalent shape; but there was one signed "for the executors and self, *J. Hall*," and another "*J. Hall, Elizabeth Outerston's trustee.*" It appeared, however, that the words *Elizabeth Outerston's trustee* were not written by, or with the knowledge of, *Hall*, or by his authority.

Upon these facts Lord *Cottenham* held that *Hall* was not shown to have received the payments in the character of assignee of the shares, observing that some of the receipts were by procuration, but that there was not one in which he purported to receive the dividends in his character as assignee, or as owner of the shares, "except in a single instance, where, after the signature of his name having no character affixed to it, there was written, not by himself but by some other person, the word 'trustee' for the lady who was the party holding them." "Now he denies" said Lord *Cottenham*, "that he has any knowledge of this writing, or that it was done by him; and upon the face of it, it does not appear that there is anything to lead to any suspicion, that it

was done by him or with his knowledge," clearly showing the opinion of Lord *Cottenham* to have been, that a person who signs as trustee, signs as owner.

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In the present case we have the company looking to these trustees as shareholders, and returning them as such. Here, as in *Hall's case*, the step of having the deed executed was omitted; but then I refer to that class of cases which decide that a person who has taken dividends as owner, cannot say that he is not a shareholder, merely on the ground that the proper forms were not complied with. The Court holds the receipt of dividends to be as binding for this purpose as the observance of the regulations for transfer. The only question, therefore, is, whether the receipts were given by them as trustees, or whether these gentlemen are at liberty now to say, that, though they were registered and returned as trustees, and gave receipts in terms as trustees, they were in fact not legal owners for want of the execution of the proper instrument. To allow that, would be to overrule the decisions which have given effect to the receipt of dividends; and, therefore, the names of these gentlemen must be put on the list simpliciter.

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POSTLETHWAITE v. LEWTHWAITE

THE Defendants and their predecessors in title had been, since 1739, lessees for lives of the rectory of *Kirkby Ireleth*, under the dean and chapter of *York*; and it had been

February 28th,
March 1st.
Lease of Chap-
ter Lands—
Sublessee with
totes quoties
Covenant—

Purchase of Reversion—Rights of Sublessee—Ecclesiastical Commissioners.—14 & 15 Vict. c. 104.

A lessee for lives from a Dean and Chapter without a covenant for perpetual renewal granted an underlease, for the same lives, of part of the premises with a toties quoties covenant, at a fixed fine. The reversion having become vested in the Ecclesiastical Commissioners, they refused to renew, but offered to sell the reversion. The lessee purchased: *Held*, that the sublessee was not entitled to perpetual renewal at the specified fine, but was entitled to a conveyance of the reversion on the terms of paying a due proportion of the consideration and expenses of the purchase, regard being had to his existing interest and the extent of the property comprised in his lease.

Inquiry directed as to the amount.

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the practice of the dean and chapter to renew the lives as they dropped upon payment of a fine, the amount of which was matter of negotiation on each occasion, the leases containing no covenant for perpetual renewal.

The Plaintiff and his predecessors in title had been, since 1743, under-lessees of a portion of the rectory.

The under-lease of 1743 recited the original lease for three lives, and "that it was presumed and intended by the parties to the now stating indenture, that, as usually was and theretofore had been done in the like case, they the said *William Lewthwaite* and *John Kirkbank*, their heirs and assigns, or some of them, at and upon the decease of any one or more of the persons before named, for the term of whose lives the said premises were to them demised, granted, and to farm letten as aforesaid, might and would, upon payment of a competent and reasonable sum of money or consideration by way or in the name of a fine for renewal to the said lessors, renew and prolong their lease and tenure of the said premises by procuring a new grant, demise, or lease of the same for or during the further term of the natural life or lives, as the case should happen to be, of such other person or persons as should be then or therein mentioned and expressed; and that also in like manner, upon determination of any one or more of such other life or lives afterwards, the like renewals and new grants of the said premises by and to them might and probably would be made and obtained," and *W. Lewthwaite* and *J. Kirkbank* demised the premises for the said three lives; "and also, further, for and during the natural life or lives of every such other person or persons, for the term whereof *W. Lewthwaite* and *J. Kirkbank*, their heirs, or assigns, should renew and prolong their lease, or obtain a new demise and grant of the said premises (that is to say), as long as they should continue lessees or farmers of the said rectory," at a yearly rent of 5s., and a fine of £5 for every new life.

The next under-lease was granted in 1787 for the lives of the survivor of the original cestuis que vie and two other persons, and thereby the rent of 5*s.* was reserved, and the lessors covenanted, that, if any of the lives should drop, "they, their heirs or assigns, should use and exert their utmost endeavours to renew or get other lives added to their own lease, and on every such renewal of or adding a new life to their own lease, they would add the same life to the under-lease on the under-lessees paying a fine of £5 for every new life, and £15 if all three lives had dropped, the under-lessees to hold under the same rent, covenants, provisoes, and agreements, as therein contained."

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The last under-lease, dated the 14th of May, 1845, in consideration of the surrender of two former leases, demised the premises for the lives of *D. Walker, J. Walton, and J. Addison*, being the lives on which the lessors held, with such benefit of renewal as thereafter mentioned, at the yearly rent of 10*s.*, and contained the following covenant by the Defendants:—

"That they, their heirs and assigns, when and so often as they shall take a new lease of the said demised premises, or procure a new life or new lives to be added thereto as aforesaid, shall and will, at the request, costs, and charges of the said *Robert Postlethwaite*, his heirs and assigns, also renew and add such life or lives to their lease of the said hereby demised premises unto the said *Robert Postlethwaite*, his heirs and assigns, he, the said *Robert Postlethwaite*, his heirs or assigns, first paying or tendering unto the said *Robert Lewthwaite* and *John Kirkbank*, their heirs or assigns, within the space of forty days next after such of the feast days hereinbefore mentioned as shall first happen after such renewal, as and in the way of a fine for the renewal and adding of each and every single new life the sum of £8 15*s.*, and for the renewal of every three new

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lives the sum of £26 5s., and there being reserved and contained in every new lease to be granted to the said *Robert Postlethwaite*, his heirs or assigns, such or the like rents, covenants, and provisoes as are reserved and contained in the present indenture, and no other."

Walker died in the year 1847; and the Defendants procured one *R. Towers* to be added as a new life to their own lease, and, in 1851, on receipt of the fine of £8 15s., agreed to add the same life to the under-lease. *Addison* died in 1852.

At this time the estates of the Dean and Chapter of *York* had been transferred to the Ecclesiastical Commissioners, who, on the Defendants applying for a renewal, declined to grant it, but offered to entertain proposals for a purchase of the reversion or a sale of the Defendants' interest.

Ultimately, the Defendants agreed to purchase the reversion of the rectory, partly for a money consideration, and partly for the surrender of other interests of the Defendants; and the rectory was accordingly conveyed to the Defendants by a deed of the 27th of January, 1859, subject to any equities (if such there were) affecting the same by virtue of any stipulations contained in any under-leases granted by them.

In the year 1860 the Plaintiff claimed to have a new life added in place of *Addison*, and tendered the sum of £8 15s. by way of fine. This was refused, but the Defendants, by their answer, alleged that they always were willing to sell to the Plaintiff and other under-lessees, the reversion of their leasehold interests on equitable terms. Evidence was gone into on both sides as to the nature of the offers and refusals by the Plaintiff and Defendants respectively.

The Plaintiff, by his bill, prayed that his rights, in respect of the estate acquired by the Defendants, might be ascertained, and that the estate of the Defendants might be declared to be subject to, and bound by, the under-lease and the covenants therein contained, in like manner as a renewed lease would have been, with such variations and modifications as the nature of the property required, and that such variations and modifications might be declared; or otherwise that the Defendants might be decreed to admit the Plaintiff to such proportionate shares and benefits in respect of such estate, whether by way of conveyance, renewed lease, or otherwise, as the Court should deem equitable and right, the Plaintiff submitting to make such proportionate contribution (if any) to or in respect of the costs, payments, or consideration paid or given for the interest so acquired by the Defendants, as the Court should think proper.

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Mr. James, Q.C., and Mr. B. R. Rogers, for the Plaintiff:—

Argument.

There was no offer by the Defendants before the filing of the bill to sell us the reversion on any better terms than it would be offered to a stranger; and we were right in filing the bill, even though our strict rights may not have been as large as our original demand.

The question is, what the strict rights of an under-lessee, or, rather, an assignee (for we have the whole term of the original lease) are, in property of this kind. There are three different classes of cases:—1. Where the renewal fines payable by the lessee and under-lessee are independent of each other. 2. Where the under-lessee, besides paying his own renewal fine, contributes to the renewal fine of the lessee. 3. Where the under-lessee contributes both to the renewal fine and the expenses of the lessee.

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 —
Argument.

In the first case the lessee, if he purchases the reversion, merely redeems his own future fines and expenses, and then the under-lessee is entitled to have his lease renewed on the same terms (as near as may be) as if the lessee had renewed his lease instead of purchasing the reversion. This, we say, is our case, and this is the right which we claimed in the first instance. Even if our covenant be regarded as a mere toties quoties covenant, and not for perpetual renewal, it is decided that a lessee purchasing the reversion must hold it as subservient to such a covenant: *Pilkington v. Gore* (a), *Evans v. Walsh* (b). In the other two cases the under-lessee would no doubt have to contribute something towards the purchase-money and costs of the purchase; because it would be for the joint benefit of lessee and under-lessee, and would relieve both of them from future payments. The statutes which secure the rights of under-lessees seem to be framed with a view to distinguish these three cases.

In the 14th & 15th Vict. c. 104, the 3rd section provides, first, that the interest acquired by a lessee shall be deemed in equity to be acquired in respect of his interest under the lease, and be subject to the same trusts, charges, and incumbrances as a renewed lease would be. This meets the first class of cases. Then the section goes on to say that all covenants which would have entitled any sub-lessees or others to derivative interests upon renewals, upon contribution to fines and other payments on renewal, shall give the like rights so far as the nature of the property will admit to proportionate shares and benefits out of any interest acquired under the Act by the lessee, upon a proportionate contribution to the costs or consideration paid or given for the interest acquired by such lessee. This meets the second class of cases.

(a) 8 Ir. Ch. C. 589.

(b) 2 Sch. & Lef. 519.

The 23rd & 24th Vict. c. 124, s. 26, provides expressly for the third class of cases, by directing that where under-lessees may have been liable to contribute to the fines and expenses of renewal, and the under-lessees, by the purchase of the reversion by the lessees, are secured in the enjoyment of the full terms which they would have had by means of the renewals, then such under-lessees shall pay to the lessees a just equivalent for the exemption from the expenses of such renewals. Our fine was fixed at £8 15s, and our strict right is to have perpetual renewal at the same fine.

[They also cited *Piggott v. Stratton*(a), *Randall v. Russell*(b).]

Mr. Osborne and Mr. Wakefield for the Defendants :—

The Plaintiff's covenant is not for perpetual renewal, but only toties quoties ; and as we have not renewed, he has no right to a new life. All the right he has is that given by the 3rd section of the Act which has been cited, and that we have always been willing to give. The case of *Pilking-ton v. Gore*, which was cited, it is true, gave the under-lessee somewhat similar rights under a toties quoties covenant to those which he would have had under a perpetual covenant ; but the distinction is, first, that the under-lease had been renewed after the purchase ; and secondly, that the purchase of the reversion was optional with the lessee, who might have renewed if he pleased, as he had a covenant for perpetual renewal. Here the renewal was refused by the Commissioners, and the Defendants were forced to purchase or abandon the property. In *Evans v. Walshe* the original lease had been renewed, though not at the old rent, and the covenant in the under-lease remained operative. Then the Plaintiff, having no right to perpetual renewal, has nothing except such equity as the statute may give him, and that is subject to a just

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(a) Johns. 341.

(b) 3 Mer. 190.

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contribution, the first part of the 3rd section referring to incumbrances in the ordinary sense, and not to the case of under-leases at all. Moreover, the fine payable by the Plaintiff was not fixed, but was increased on the last lease from £5 to £8 15s.

The evidence shows that we were always ready to sell the reversion on equitable terms; and if this is all the Plaintiff gets by the bill, he must pay our costs. We were clearly right in refusing to insert a new life, and that is the only thing the Plaintiff asked or we refused.

Mr. *James*, in reply.—We admit that we have only a toties quoties covenant; but after a purchase by the lessee of the reversion, this becomes equivalent to a covenant for perpetual renewal. That is what the Irish cases decided. As to the change of fine in 1853, that was in consideration of the surrender of two other leases, probably of other property.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Having regard to the case before Lord *Redesdale*, the rights of the Plaintiff appear to me to be clearly these: He was interested in the estate under a covenant by the Defendants, that, so often as they renewed their lease, they would add the same life to the Plaintiff's lease, on payment of a fine of £8 15s.; such new lease to reserve and contain such or the like rents, covenants, and provisions as the lease of 1845. That gave the Plaintiff a right, on every renewal of the Defendants' lease, to have the same life added at the specified fine.

The payments which the Plaintiff would otherwise have had to contribute towards the expenses of each renewal, were, I think, compounded for at this fixed rate; and,

therefore, it is contended, on the part of the Plaintiff, that it was for the lessees to consider whether it was worth their while to renew on such terms as they could obtain ; but that, if they did, they must do so subject to the right which the Plaintiff had acquired, to have a like renewal at a fixed rate.

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So long as matters remained on the old footing, it might be assumed that the Dean and Chapter would be willing always to renew, it being their interest to obtain the fines ; but this state of things was disturbed by the statutes passed in order to discourage such renewals, and by the subsequent vesting of the property in the Ecclesiastical Commissioners, who would be almost as certain to refuse to renew, as the Dean and Chapter would be to renew. This was foreseen by the legislature ; and, in order to meet the equity of the case, it was provided, that, where a renewal was refused, a lessee was to be put in a position to purchase, with certain advantages, by reason of his being such lessee. That being so, the Dean and Chapter on being applied to for a new lease, said, that they could not grant it, because they had handed over the property to the Ecclesiastical Commissioners. The Commissioners, again, said that they would not renew, but were willing to sell the reversion. That sale, of course, would be subject to the statutory provisions.

Now, whatever the benefits are which the Defendants have thus obtained upon their purchase of the reversion, the Plaintiff has a right to say they must hold, as trustees for him, to the extent of his interest ; which is, in fact, tantamount to the whole, because the Defendants had no interest in their lease beyond what they had agreed to give, on certain terms, to the Plaintiff.

On the other hand, the Defendants say, they had a

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single lease, comprising a large amount of property, which they had parcelled out in several under-leases; and it may be fairly assumed that the Ecclesiastical Commissioners would not have consented to split the property, and deal with the small portion in which the Plaintiff is interested, by itself. The Defendants, therefore, found themselves in this position,—that they were compelled, in order to save the property, to purchase the fee simple of the whole. This was not a case of acting in fraud of a covenant, by purchasing the reversion in order to get rid of a toties quoties covenant, the purchase, in this case, not being in any proper sense a matter of option. On the contrary, if the Defendants wished to preserve the property, even in the Plaintiff's interest, they must purchase the fee.

Then, the rights flowing out of this state of things will be, I think, such as are described in the judgment in *Evans v. Walshe*. There, the lessor refused to renew on the old terms. The lessee purchased the leasehold interest in consideration of a greatly increased rent. Lord *Rodesdale* granted an injunction in terms which seem exactly to meet the equity of this case. He said, he must grant the injunction, considering the Defendant bound to renew to the Plaintiff on the old terms, unless he chose to abandon the property. . . . "If he thought fit to retain the benefit of the renewal which he had obtained, he was bound specifically to execute his covenant for renewal." This is tantamount to considering a purchasing lessee very much in the position of a partner or fiduciary with respect to his sub-lessee.

Applying this doctrine to the present case, the Plaintiff clearly has not an absolute right to say, "You must put in new lives for ever, because you hold the fee simple, and are therefore in the same position as if you had renewed for ever;" but the equity is this, that the lessee, having

purchased the whole, and having been forced so to purchase, the under-lessee has a right to call for a conveyance of the fee of the particular property comprised in his under-lease, upon the terms of satisfying his share of the expenses of acquiring it, having regard to the value of his covenants, which would have to be deducted from the valuation of the fee simple of the property comprised in his lease.

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Therefore, if it be asked, I will make a decree in this form :—The Defendants offering to convey the reversion in fee simple of the premises comprised in the Plaintiff's lease, in preference to granting a new lease of the premises with a covenant for perpetual renewal and otherwise on the terms of the present lease, declare that the Plaintiff is entitled to have such reversion conveyed to him on the terms of paying the Defendants a due proportion of the consideration paid or given by them, and of the expenses incurred by them, in purchasing the fee simple of so much of the property comprised in their original lease as they did purchase, regard being had to the existing interest of the Plaintiff under his lease and to the extent of the property therein comprised. Then there must be an inquiry what this interest is worth. As to the costs, the Defendants swear that they offered the Plaintiff's father to give him the option of purchase so soon as their own purchase should be completed; but I do not rest my judgment on this. The question is, what application was made by the Plaintiff to the Defendants; and I find no evidence of any demand except to have a new life added. This I hold to have been wrong, and I cannot treat the Defendants' refusal to accede to it as a refusal to do anything in the matter. The purchase was in January, 1859, and the Plaintiff made no application till October, 1860. The bill was filed in January, 1861, without any further communication, and immediately after this the Defendants offered to convey on

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fair and equitable terms. It is true they avoided saying on what principle the valuation was to be made, but they said they had put it in the hands of a gentleman who they believed would consider any advantages to which the Plaintiff might be entitled. This was, no doubt, vague, but there is nothing like a refusal of the Plaintiff's right. If I could find a distinct admission of the Plaintiff's right I should give the Defendants costs as trustees, but under the circumstances I think they are entitled to costs up to the hearing as between party and party.

3089a 539

~~3089a 539~~

1861.

December 9th,
 & 11th.

GARDNER v. THE CHARING CROSS
 RAILWAY COMPANY.

*Railway Com-
 pany—Lands
 Clauses Conso-
 lidation Act—
 8 Vict. c. 18,
 s. 92—Part of
 a House, Build-
 ing, or Manu-
 factory—No-
 tice to treat—
 Counter-notice.*

A landowner, who, upon being served by a Company with notice to treat for a part of his property, replies by claiming a given sum for the part, is not thereby precluded, if that sum be refused, from asserting his right, under the 92nd section of the Act, to require the Company to take the whole.

IN the year 1861 the Plaintiffs, *Henry Gardner* and *William Gardner*, were joint tenants of a public-house, yard, and skittle-ground in the parish of *St. Mary, Lambeth*, known as the *Sea Lion* public-house, part of which was required by the Defendants for their projected railway.

On the 20th of August, 1861, the Plaintiffs were served by the Defendants, under the 18th section of the *Lands Clauses Consolidation Act* (a), with a notice to treat for the part of the premises required by the Defendants, together with a printed form of claim, in which they were, within twenty-one days after service of the notice, to state the particulars of their claim.

The Plaintiffs filled up the printed form, and thereby claimed, for their interest in the part of the premises specified in the notice to treat, and for compensation for the damage that would be sustained by them, the sum of

(a) 8 Vict. c. 18.

922427

£800. And on the 9th of September they returned the printed form so filled up to the Defendants.

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 —
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The printed form so returned related only to the part of the premises specified in the notice to treat, and contained no intimation of an intention on the part of the Plaintiffs to require the Defendants to take the whole of the property.

On the 10th of September Mr. *Ryde*, the Defendants' surveyor, wrote to the Plaintiffs' surveyor:—"I hope I am not to consider that £800 is seriously asked for Messrs. *Gardners'* interest in the narrow strip of land two feet wide at one end, and seven feet at the other. . . . Will you kindly let me know to-morrow morning if Messrs. *Gardner* will allow the Company to take possession. Otherwise, I fear, we must resort to the compulsory powers of the Act of Parliament, which we always do most reluctantly."

Upon the receipt of this letter the Plaintiffs consulted their solicitors, Messrs. *Boulton*, who, on the 13th of September, wrote to Mr. *Ryde* thus:—"We will see Messrs. *Gardner*, and communicate with you on the subject to-morrow. We cannot advise Messrs. *Gardner* to consent to your taking possession." And on the 14th of September Messrs. *Boulton* wrote a second letter to Mr. *Ryde*, as follows:—"Messrs. *Gardner* consider that their premises will be damaged to the extent of £800—the sum claimed for the portion required by the railway—and are not disposed to agree to accept less. If you cannot advise this amount to be given, they will require the Company to take all the premises, and for which they will want £3,000."

On the 16th of September Mr. *Ryde* wrote to Messrs. *Boulton*—"I have duly received your letters of the 13th and 14th instant; but, as I cannot accede to the terms pro-

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posed, I can only express my regret that we are unable to settle by agreement."

In the meantime the Defendants had proceeded, under the compulsory powers of the Lands Clauses Consolidation Act, but without the knowledge of the Plaintiffs, to obtain a valuation by a surveyor, nominated for that purpose under the 85th section of the Act, of the part of the premises specified in the notice to treat; who, by a valuation under his hand dated the 14th of September, declared that £150 and no more was the value and ought to be paid by the Defendants for the purchase of the Plaintiffs' interest therein.

On the 19th of September the Defendants paid the sum of £150 into the Bank of *England*, pursuant to the provisions of the 85th section of the Act, and executed a bond of that date to the Plaintiffs in a penal sum equal to the sum so deposited; and on the 20th of September they delivered the bond to the Plaintiffs.

Upon the receipt of the bond, Messrs. *Boulton*, on the 24th of September, served on the Defendants a formal counter-notice, under the 92nd section of the Act, requiring the Defendants to purchase and take the whole of the public-house, yard, skittle-ground, and premises belonging to the Plaintiffs; and not to enter upon the part specified in the notice to treat, until they had obtained a valuation of the whole of the premises, and deposited the amount of such valuation in the Bank, and executed a bond in a penal sum equal to that amount, pursuant to the Act; or until they agreed to accept the terms proposed on behalf of the Plaintiffs for the purchase of the portion of the premises specified in their notice to treat.

The Defendants, notwithstanding this counter-notice, proceeded to enter upon the portion of the premises specified

in the notice to treat; whereupon the Plaintiffs filed their bill, praying that it might be declared that the Defendants, the Company, were bound and compellable, if they required the piece of land mentioned in the notice of the 20th of August, 1861, to purchase and take the whole of the said premises, and not merely such part thereof as was specified in the said notice; and that it might be declared that the Plaintiffs were not bound to sell or convey the part of the premises specified in the said notice, or any other part thereof less than the whole, the Plaintiffs being willing, and thereby offering, to sell and convey all their estates and interests in the whole of the said public-house and premises accordingly. The bill prayed, also, for an injunction, founded upon this declaration.

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During the long vacation, an ex parte injunction was obtained. But by arrangement between the parties, the Defendants were afterwards allowed to take possession of so much of the premises as was specified in the notice to treat; and the cause now came on for hearing upon notice of motion for a decree limited to the declaration asked by the prayer of the bill.

Mr. *Everitt*, for the Plaintiffs, now moved for a decree, in terms of the notice of motion.

Argument.

The Lands Clauses Consolidation Act does not contain any limitation as to the period within which a landowner, who has been served by a railway company with notice to treat for a part of his property, may serve the company with a counter-notice, requiring them to take the whole. The 92nd section of the Act is indefinite as to time. It provides, "That no party shall, at any time, be required to sell or convey to the promoters of an under-

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taking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." The words being "no party shall *at any time* be required," the landowner is at liberty, at any time, to call upon the promoters of the undertaking to take the whole of his property, provided that property be of the description to which the 92nd section of the Act refers.

But, admitting that there is an implied limit as to the period within which a counter-notice must be served, the Plaintiffs have not exceeded that limit. The notice to treat for a part of the premises was given on the 20th of August, and on the 14th of September the Plaintiffs' solicitors wrote to the Company's surveyor, that, if he could not advise £800 to be given for the part of the premises, the Plaintiffs would require the Company to take the whole. That letter amounted, in effect, to the counter-notice required; and after notice by a company to take a part, and counter-notice by the landowner requiring the company to take the whole of a property of the description contemplated by the 92nd section, the company cannot take possession of any portion until they have deposited in the Bank the value of the whole of the property in question: *Giles v. The London, Chatham, and Dover Railway Company* (a). To deposit only the value of so much as they require to take, and have specified in their notice to treat, is not sufficient (b).

It will be argued, that, by stating, in reply to the notice to treat, that they were willing to accept £800 for the part specified in the notice to treat, the Plaintiffs waived their rights under the 92nd section, and precluded themselves from insisting, as they did subsequently, that if £800

(a) 1 Drew. & Sm. 406.

(b) Ibid.

were not given for the part, they would require the Company to take the whole of the property. But, in order to establish that the Plaintiffs waived their rights under the 92nd section, the Defendants must show a concluded agreement; and a notice to treat, followed, as here, by a statement on the part of the landowner of the particulars of his demand, does not amount to a concluded agreement. The mere service by a company of a notice to treat does not constitute a contract by the landowner to sell his land: *Haynes v. Haynes* (a). The notice to treat is merely inchoate, and the statement by the landowner of the particulars of his demand does not perfect it into a contract. Until that demand is complied with by the Company it is open to the landowner to withdraw: *Pinchin v. The London and Blackwall Railway Company* (b). Here the demand has never been complied with by the Company. On the contrary, the Company expressly refused to entertain it. The treaty was, therefore, at an end; and the Plaintiffs were at liberty to fall back upon the 92nd section of the Act.

The Defendants seek to avail themselves of the provisions of the 85th section of the Act; but it is incumbent on a company taking that course to show clearly that they have complied with all the requisitions of the 85th section; and if room be left for doubt whether they have done so, the landowner is entitled to have the benefit of the doubt: *Barker v. The North Staffordshire Railway Company* (c).

[He cited also *Spackman v. The Great Western Railway Company* (d).]

Sir *H. Cairns*, Q.C., and *T. Smith Osler*, for the Defen-

(a) 1 Drew. & Sm. 426.

(b) 1 K. & J. 35; S.C., 5 D. S.C., 5 Railway Cas. 401.

M. G. 851.

(c) 2 De Gex & Smale, 55;

(d) 1 Jur., N.S., 790.

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dants, the Railway Company, contended that the bill should be dismissed.

The Plaintiffs, by entertaining the notice to treat, and delivering in reply their particulars of demand, waived any rights they might otherwise have claimed under the 92nd section. When once a landowner, upon being served by a company with notice to treat for a part of his property, entertains the application and names a price for the part, without more, he precludes himself from forcing the whole of the property upon the company. According to the Plaintiff's construction of the 92nd section a landowner would be at liberty, after indefinite treaty, to turn round at the last moment and demand that the company should take the whole. Such a construction would enable landowners to mislead companies by false expectations into useless expense, and could not have been intended by the Legislature. Here, the Plaintiffs, by entertaining the notice to treat, and delivering in reply their particulars of demand, without stating explicitly, in the first instance, that if that demand were refused they would fall back upon their powers under the 92nd section, have misled the Company.

We do not deny, that, upon being served by a company with notice to treat for a part of his property, a landowner may name a price for the part, and yet reserve to himself the right of insisting that if that price be not given he will not treat for a sale of the part at all. But this intention to reserve his rights under the 92nd section must be clearly and distinctly expressed. In the letter of the 14th of September, it is clearly expressed; but that letter was written too late: the Company had already resorted to the compulsory process provided by the Act.

THE VICE-CHANCELLOR.—That letter was received be-

fore the Plaintiffs had notice that the company were resorting to compulsory process.

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Sir *H. Cairns*, Q.C.—The company had obtained a valuation of a surveyor as early as the 14th of September, with a view to the deposit and bond mentioned in the 85th section of the Act; and the Plaintiffs cannot now be allowed to prevent the company's proceeding under that section.

It has been held, that, if after a company has given notice to treat for a part of property of this description the landowner calls upon them to take the whole, the company may withdraw from their notice, and carry their line elsewhere; which shows the importance the Courts have attached to the duty of stating explicitly and at once what the claim of the landowner really is: *Reg. v. The London and South Western Railway Company* (a). In *Spackman v The Great Western Railway Company* (b) there was no claim on the part of the landowner which could mislead the company.

[He cited also *Sparrow v. The Oxford, Worcester, & Wolverhampton Railway Company* (c).]

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Judgment.

I cannot entertain any doubt as to how the Lands Clauses Consolidation Act should be applied to the facts of this case.

The 92nd section of that Act provides "that no party shall at any time be required to sell or convey to the pro-

(a) 12 Q. B. 775. (b) 1 Jur. N. S. 790. (c) 2 D. M. G. 94.
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motors of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to convey the whole thereof."

I by no means hold—nor is it necessary for the purpose of this suit that I should hold—with the Plaintiffs' counsel, that the words "at any time" extend indefinitely to all time, however remote, so as to leave the landowner at liberty, at any distance of time,—whatever expense or inconvenience he may have allowed the promoters of the undertaking to incur, upon the supposition that they would be allowed to take a part,—to turn round and insist on their taking the whole of his property.

The real question is, what is the meaning of the word "required?" I read it as equivalent to "compelled"—"no party shall be put under compulsory process"—to sell or convey a part, if he be willing and able to sell or convey the whole. It cannot mean that no landowner shall be served with notice to treat for a part; for it has been repeatedly held, that the promoters of an undertaking are at liberty to give notice to treat for a part of a manufactory or other like property. It must, therefore, mean that no landowner shall be *compelled* to convey.

Then, when does compulsion arise? It arises when the company first begin to put their compulsory powers in force. And in the case before me I find nothing in the shape of compulsion attempted by the company until after the Plaintiffs had given them notice, as they did by their solicitor's letter of the 14th of September, that, if the company's surveyor could not advise £800 to be given for the part of the Plaintiffs' property specified in the notice to treat, the Plaintiffs would require the company to take the whole.

The question, therefore, is reduced to this,—whether, the Company having served the Plaintiffs with notice to treat

for a part of the property in question, the Plaintiffs, by claiming £800 for that part, have precluded themselves, thenceforth and for ever, from insisting, that, if £800 be not given for the part, they will require the company to take the whole.

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In my judgment it would be unreasonable to hold anything of the kind; £800 may be a very good price for part of a property, and the owner may well be disposed—he may even prefer—to retain the rest provided he can obtain £800 for the part required; but the moment an attempt is made to compel him to sell the part for a less sum than £800, he may say with reason, that, unless he can obtain £800 for the part, he would prefer to sell the whole.

The object of serving a notice to treat—as Vice-Chancellor *Kindersley* has said in *Haynes v. Haynes* (a), after minutely analysing the views of the different Judges who have had to consider the subject—is, not to constitute a contract between the parties, but to put the parties into a position to enter into a contract. If the notice to treat results in a contract, nothing further is required. If it does not, then the company must have recourse to compulsory process; and as soon as the company have recourse to compulsory process, then comes into operation the 92nd section of the Act, which enacts that no landowner shall be required by compulsory process under the Act to sell a part of property of this description, if he is willing and able to sell the whole.

Here the Defendants do not have recourse to compulsory process until the 19th of September; and five days previously to that date, the Plaintiffs' solicitors had written to them as follows :—

“Messrs Gardner consider that their premises will be

(a) 1 Drew. & Sm. 450.

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damaged to the extent of £800, the sum claimed for the portion required by the railway, and are not disposed to agree to accept less. If you cannot advise this amount to be given, they will require the company to take all the premises, for which they will want £3,000."

I take that letter to be a sufficient counter-notice under the 92nd section of the Act.

It was argued for the Defendants that if this be so, then so soon as a company has given notice to treat, and that notice has been followed by a counter-notice, the company are bound. I answer, it may be put higher than that. The company are bound without any counter-notice. They are bound whether the landowner answers the notice within the twenty-one days (a) or not. They are bound the moment their notice is given. The whole essence of all the decisions upon this subject is, that a company, having once given notice to treat, cannot recede; and if the notice to treat relate to a part only of a house, building, or manufactory, as defined by the Act, then the landowner has the right under the 92nd section to require them to take the whole. The only question is, when is that right to be exercised? It accrues the moment notice is given. The landowner does not mature it by giving a counter-notice. He has as good a right before he serves the counter-notice as after he has served it.

In this case, so soon as the Plaintiffs learnt that the company would not agree to their terms for the part of the land in question, and gave the counter-notice of the 14th of September requiring the company to take the whole, the case of *Giles v. The London, Chatham, & Dover Railway Company* (b) was applicable, to show what was right to be done. That counter-notice being once given and in reasonable time, the company were no longer at liberty to

(a) Sect. 21.

(b) 1 Drew. & Sm. 406.

take possession of any part until they had deposited in the Bank the value of the whole of the property in question.

As the Plaintiffs have arranged to dispense with an injunction, and ask only for a declaration of right in the terms of their notice of motion, the decree will be confined to a declaration of right.

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DECLARE that the Defendants, the company, are bound and compellable to take the whole of the premises and not merely the part specified in the notice; and that the Plaintiffs are not bound to sell and convey the part specified in the notice, or any other part of the premises less than the whole, the Plaintiffs being able and willing to convey the whole.

Minute
of Decree.

The Defendants to pay the Plaintiffs their costs of the suit.

8th Dec. 1861.

MEDES v. GUEDALLA.

THE bill was filed by *Abraham Medes* and *Jessy Lydia Medes*, his wife, by *Henry William Wright*, her next friend, against *Haim Guedalla*, *Samuel Helbert Ellis*, and *Jesse Brandon*, the trustees of certain *Spanish*

their trust funds comprise stocks or securities which are payable to bearer and pass by delivery, and of which the interest is payable upon coupons half-yearly.

Such securities may without breach of trust be deposited in a box at a bankers' on account of all the trustees, one being allowed by the rest to keep the key of the box in order to obtain the coupons.

And if the bankers, without the privity or concurrence of the co-trustees, deliver the box to the trustee who has the key, the co-trustees remaining ignorant of the fact are not liable to make good securities which the latter subsequently withdraws from the fund.

Two of three trustees committing a box containing such securities to the third (a stock-broker) for the purpose of conversion, are bound to ascertain, when the box is returned to the bankers, that such conversion has been effected, and the new securities restored to the joint custody of all the trustees.

Two of three trustees, who, under such circumstances, rested satisfied with the assurance of the solicitor for the trust that he had seen the box returned to the bankers, without more—Held liable to make good such of the new securities as the third trustee had appropriated to his own use.

22 Ch. D. 732
Jan 29th, 30th
March 31st.
Trustees and
Cestui que trust
—Negotiable
Securities—
Custody of—
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Fraud of one
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ability of Co-
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stock or bonds payable to bearer, in which the Plaintiff *Jessy Lydia Mendes* was interested under the will of her late father, *Joshua Israel Brandon*, deceased, and the other persons interested under the will. And the scope of the bill was to compel the Defendants *Haim Guedalla* and *Jesse Brandon* to make good the amount in value of the said stock, which their co-trustee, *Ellis*, a stockbroker, had fraudulently and without their knowledge withdrawn from the box containing the trust property, and lost in unsuccessful speculations upon the Stock Exchange.

The testator by his will, dated 1843, devised and bequeathed all his residuary real and personal estate to his wife, the Defendant *Jesse Brandon*, and to three other persons who afterwards disclaimed, upon trust to convert such personal estate and invest the proceeds, with power to vary investments: and to stand possessed of his real estate, and the trust moneys, stocks, funds, and securities to arise from his personal estate, upon trust, during the life of his wife and during the respective lives of his children, to pay to his children certain annuities, including an annuity of £200 to the Plaintiff *Jessy Lydia Mendes* for her separate and inalienable use, and subject thereto to pay the rents and annual produce to his said wife during her life, and subject thereto upon certain trusts for the benefit of his children and their issue. The will contained a proviso and declaration by the testator, that, unless his trustees or trustee should see any very pressing reason to the contrary, so much of the testator's personal estate as should consist of *Spanish* bonds should be retained by his trustees or trustee for the time being upon the aforesaid trusts, and should not be sold or converted under the general direction thereinbefore contained in that behalf, until £50 at the least could be obtained for each bond of £100. The testator appointed his wife and her said co-trustees executrix and executors of his will.

The testator died in 1847, his will was proved by his widow the Defendant *Jesse Brandon* alone, all the other trustees having disclaimed the trusts and renounced probate of the will.

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The testator's residuary personal estate comprised, inter alia, £24,480 "Spanish Active Stock," and £6,417 10s. "Spanish Passive Stock," found at his decease in a box which he had deposited with his bankers, Sir *Samuel Scott & Co.* Both stocks were payable to bearer, and passed by delivery.

In 1848 a suit was instituted by *Jessy Lydia Mendes*, by *Richard Ellis*, her next friend, for the administration of the testator's estate; and by an order made in that cause the Defendant *Haim Guedalla* was appointed receiver of the testator's outstanding personal estate.

In 1849 an agreement was come to for a compromise of all matters in question in the last-mentioned suit.

Pursuant to that agreement, by an indenture dated the 7th of February, 1850, the Defendants *Ellis* and *Guedalla*, under a power in that behalf in the will, were appointed trustees jointly with the Defendant *Jesse Brandon*; and by the same indenture the testator's personal estate was assigned to the Defendants *Jesse Brandon*, *Ellis*, and *Guedalla*, upon the trusts in the will declared of the testator's residuary personal estate, but subject (by reference to a deed of even date) to a proviso, that notwithstanding the declaration in that behalf contained in the will, the said *Spanish* bonds should be sold or converted with all convenient speed, it being considered by the parties that the circumstances of the testator's personal estate formed a very pressing reason for so doing; and to a proviso, that so much of the testator's personal estate in *England* as was to be called in, sold, or converted into money, should be called in, sold, and converted into money under the immediate direction of *Guedalla*.

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Shortly afterwards, the Defendant *Jesse Brandon* wrote to Sir *Samuel Scott & Co.* a letter, dated February, 1850, as follows :—" *Re Joshua J. Brandon*, deceased. Messrs. *Samuel Helbert Ellis* and *Haim Guedalla* have been appointed trustees of this estate jointly with myself. I beg to request that you will transfer to the following account, namely, Mrs. *Jesse Brandon* and Messrs. *Samuel Helbert Ellis* and *Haim Guedalla*, the cash balance standing to the credit of this estate, and also the box containing various securities now held by you and belonging to the estate."

Previously to the appointment of new trustees, the key of the box was kept by the Defendant *Jesse Brandon*, who was then the sole executrix and trustee of the will. Upon the appointment of the new trustees, the key was given by her into the custody of Mr. *Nathaneel Lindo*, who had acted as her solicitor in the management of the testator's estates from the time of his death.

In the year 1851, a proposal was made by the *Spanish* Government for the conversion of the public debt of *Spain* into Perpetual Deferred Rent of 3l. per cent., to be represented by bonds payable to bearer; and the Plaintiffs and the other parties interested under the testator's will being desirous to have the £24,480 Active Stock, being part of the testator's estate, converted in accordance with this proposal, it was agreed that the Defendant *Ellis*, who was a member of the Stock Exchange, should be employed to effect the conversion. But the bankers objecting to part with the securities to *Ellis* without the authority in writing of his co-trustees, *Lindo*, in January, 1852, sent to the Defendant *Jesse Brandon*, who was then in *Paris*, a form of letter for her signature, as follows :—

" To Messrs. Sir *Samuel Scott & Co.*

" *Paris*, 29th January, 1852.

" Gentlemen,—Be pleased to allow Mr. *Samuel Helbert*

Ellis, my co-trustee, to have the box containing the *Spanish* bonds in your possession for the purpose of conversion, which has become necessary.

“ I am, Gentlemen, your obedient servant.”

This form was signed by *Jesse Brandon*, and returned by her to *Lindo*, who handed it to *Ellis* shortly afterwards, for the purpose of his procuring the bonds to be converted. *Lindo* at the same time, by the direction of *Jesse Brandon*, gave to *Ellis*, for the purpose of such conversion, the key of the box containing the bonds.

It did not appear that *Guedalla* ever signed any authority similar to that contained in the letter of *Jesse Brandon* to Sir *Samuel Scott & Co.*, of the 29th of January, 1852.

In February, 1852, the Defendant *Ellis* presented the letter of the 29th of January, 1852, at the bank of Sir *Samuel Scott & Co.*, and obtained from them, and carried away with him, the box containing the stock.

In the same month of February, 1852, the Defendant *Ellis* converted the £24,480 Active Stock, and received in exchange £28,347 : 10 : 0 Deferred 3l. per cent Stock. But of this he appropriated to his own use £7,650 Deferred Stock, by borrowing money upon it on the Stock Exchange, and deposited the balance only (£20,697 : 10 : 0 Deferred Stock) in the box. He then restored the box with its contents, (£20,697 : 10 : 0 Deferred Stock, and £6,417 : 10 : 0 Passive Stock), to Sir *Samuel Scott & Co.*

By an indenture dated the 31st of July, 1852, to which the Defendants, *Jesse Brandon*, *Ellis*, and *Guedalla*, were made parties, but which was not executed by *Guedalla*; it was declared that the last-named Defendants, and the trustees or trustee for the time being, should stand possessed of the £28,347 : 10 : 0 Deferred 3l. per cent. Stock, which the Defendant *Ellis* had received in exchange for the

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£24,480 Active Stock, and the dividends and annual income thereof, upon the trusts referred to in the deed of the 7th of February, 1850.

From the time of the conversion in 1852, until January 1856, the Defendant *Ellis* retained the key of the box, and regularly paid to the credit of the trustees sums equal to the dividends on the whole of the new stock produced by the conversion.

In the year 1856, the Defendant *Ellis* failed on the Stock Exchange, and absconded from this country. The box was then examined and found to be empty.

It appeared by a statement in writing made by *Ellis* on the 10th of April, 1856, and which by consent was read as an affidavit, that, after the first robbery, the box remained at the bankers till the time for payment of the next dividends, when he again applied to the bankers and asked for the box. *Ellis's* statement proceeded as follows:—"The clerk to whom I applied went to the cash room, and on his return said, he would bring it to me, which he did without further observation. I do not remember there was any difficulty made; and the box, I suppose, was given to me on the old order of Mrs. *Brandon*. I did not again return it, as at the time I thought it would save me a great deal of trouble in future if I kept the box myself." He then went on to admit, that from August, 1852, until January, 1856, when he returned the box to the bank of Sir *Samuel Scott & Co.*, his speculations on the Stock Exchange turning out unsuccessfully, he had at various times abstracted from the box, and appropriated to his own use or in payment of the debts incurred by his unsuccessful speculations, the whole of the remaining bonds; so that when he returned the box to the bank in January, 1856, it was empty.

The bill, filed in November, 1858, stated such of the foregoing facts as were then known to the Plaintiffs, and

prayed that an account might be taken of the highest market price which could have been produced by a sale of the £28,347 : 10 : 0 *Spanish* Deferred 3*l.* per cent. Stock and of the £6,417 : 10 : 0 *Spanish* Passive Stock respectively, on the day of the sale thereof; and that an account might be taken of the amount of 3*l.* per cent. Consolidated Bank Annuities which could have been purchased therewith; and that an account might also be taken of the amount which would have accrued due on such Bank Annuities in respect of dividends; and that the Defendants *Guedalla*, *Ellis*, and *Jesse Brandon*, might be decreed, at the Plaintiffs' option, either to make good such 3*l.* per cent. Consolidated Bank Annuities and dividends, or the moneys which on taking the aforesaid account might be found to be due to them, with interest at 5*l.* per cent. with yearly rests; and that the Defendants, *Jesse Brandon*, *Ellis*, and *Guedalla*, might be removed from the trusteeship, and new trustees appointed in their stead.

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The Defendants *Jesse Brandon* and *Guedalla* by their answers, and *Lindo* by affidavit, denied all knowledge or suspicion of the frauds committed by *Ellis*, until his failure in 1856.

Lindo, by an affidavit in the cause, deposed (inter alia) as follows:—"I acted as solicitor of the Defendant *Jesse Brandon* in the management of the estate in *England* of the testator *Joshua Israel Brandon*, from the time of his decease until the appointment of new trustees of the said estate by the deed of the 7th of February, 1850. From the time of such appointment, until the year 1856, I continued to act in the management of the trust estate as solicitor of the said *Jesse Brandon*, with the acquiescence of the said new trustees, and during that period from time to time remitted to the Plaintiffs and other parties interested under the will the proceeds of the estate to which they were respectively entitled under the said will."

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—
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Then, referring to the securities contained in the box deposited at the bank, he deposed as follows:—"On the 4th of March, 1850, the Defendant *Ellis* and I examined the box at the bank, and found the said securities all duly deposited therein. The key of the box was given into my custody about the time of the appointment of new trustees. After such appointment I retained the custody of the key until I delivered it to the Defendant *Ellis* for the purpose of the conversion of *Spanish* Stock. I so delivered the key to the Defendant *Ellis* by the direction of the said *Jesse Brandon*. I did not consult the Defendant *Guedalla* previously to such delivery of the key, as he was absent from *England*, and I knew not where to address him. I believe that the Plaintiffs knew at the time of the conversion that the key had been delivered to *Ellis*, for they knew that the bonds could not be converted without the Defendant *Ellis* had access to the box; and they knew that the conversion was effected by him; and the said Plaintiff *Abraham Mendes* assisted him in making it. After the conversion took place I, as solicitor to the said *Jesse Brandon*, took steps to ascertain whether the new *Spanish* bonds procured by such conversion were duly deposited at the said bank. Accordingly, in the early part of the year 1852, shortly after such conversion took place, I called upon the Defendant *Ellis* at his office in *Throgmorton-street*, and in answer to my inquiries he stated that the conversion had been completed, and the box returned to the bank with all the new bonds in it. I very shortly afterwards attended at the bank, and made inquiry there whether such new bonds had been so deposited. My said inquiries were addressed to one of the partners in the said firm—I believe, Mr. *Samuel Scott*. He referred to one of the clerks in the bank, and then replied that the said box had been returned to the bank. Such reply appeared to me perfectly satisfactory, and I concluded therefrom that the new bonds were there, and would re-

main safely in the custody of the said bank to the joint account of the said three trustees. Immediately afterwards I informed the Defendant *Jesse Brandon* of the result of the said inquiries, and I informed the Defendant *H. Guedalla* upon his return to *England* shortly afterwards."

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Statement.

The cause now came on to be heard.

Mr. *Rolt*, Q. C. and Mr. *C. Locock Webb*, for the Plaintiffs, contended that the Defendants *Guedalla* and *Jesse Brandon* were jointly and severally liable to make good the amount in value of all the stock (i.e. the £28,347 : 10 : 0 Deferred Stock, and of the £6,417 : 10 : 0 Passive Stock.)

Argument.

To the extent of the £7,650 Deferred Stock (part of the £28,347 : 10 : 0 like stock) which *Ellis* withdrew from the trust funds in 1852 upon the occasion of the conversion, the liability of *Guedalla* and *Jesse Brandon* is clear. From February, 1852, when the box and key were delivered to *Ellis* to effect the conversion of the stock, until the year 1856, when *Ellis* failed and absconded, neither *Guedalla* nor *Jesse Brandon* ever searched the box or caused it to be searched, in order to ascertain whether *Ellis*, who had been entrusted with the duty of converting the Active Stock, had deposited in the box, as he was bound to do, the equivalent amount of Deferred Stock. *Ellis* having failed in that duty—having appropriated £7,650, part of the Deferred Stock, to his own purposes, the liability of his co-trustees to that extent is clear. Trustees who know that a co-trustee has a duty to discharge with regard to the investment of trust funds or the varying of securities, are bound to ascertain within a reasonable time that such duty has in fact been discharged ;

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Argument.

Walker v. Symonds (a). To the extent therefore of the first robbery, (£7,650) the Defendants *Guedalla* and *Jesse Brandon* are clearly liable.

And they are equally liable for the robbery of the remaining securities (£20,697:10:0 Deferred Stock, and £6,417:10:0 Passive Stock) which *Ellis* restored to the bank in 1852 after effecting the conversion, but made away with after he had a second time obtained possession of the box. For had they made in 1852, upon the return of the box, that inquiry which as trustees, knowing that their co-trustee had been entrusted with the duty of conversion, they were bound to make, with a view to ascertain that he had in fact discharged that duty, they would have discovered the gross fraud he had perpetrated, and after that discovery they would have put it out of his power to repeat the theft. Besides, the mere fact of their leaving the key in the possession of *Ellis* from February 1852 until 1856, without ever taking the trouble to inquire as to the box or its contents, was sufficient to make them liable for the consequences of their laches.

Wilkins v. Hogg (b) will be cited contra; but the Lord Chancellor's decision in that case turned upon the wording of a very unusual indemnity clause, which is not found here; nor would even such a clause have protected the Defendants in this case from liability.

The following cases are authorities for holding trustees in the position of the Defendants liable to make good trust funds made away with or lost by their co-trustee:—*Hanbury v. Kirkland* (c), *Chambers v. Minchin* (d), *Gregory v. Gregory* (e), *Booth v. Booth* (f), *Egbert v. Butter* (g)

(a) 3 Swanst. 1

(b) 8 Jur. N. S. 25.

(c) 3 Sim. 271.

(d) 7 Ves. 196.

(e) 2 Y. & Coll. Exch. 313.

(f) 1 Beav. 125.

(g) 21 Id. 560.

where co-trustees were held liable after eighteen years, *Thompson v. Finch* (a), and *Cowell v. Gatcombe* (b).

Mr. *Giffard*, Q.C., and Mr. *Jessel*, for the Defendant *Jesse Brandon*, contended that the bill should be dismissed.

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As regards the bulk of the stock (the £20,697 Deferred Stock, and the £6,417 : 10 : 0 Passive Stock), it is impossible to hold either *Jesse Brandon* or *Guedalla* liable for the robbery perpetrated by *Ellis*. This portion of the stock was duly returned by *Ellis* to the bankers, locked up in the box, after the conversion. The bankers never had authority from either of the Defendants to part a second time with the box or any portion of its contents. The letter of the 29th of January, 1852, authorised them to part with the box upon the first occasion, "for the purpose of conversion," but no further. The authority was limited to that purpose and that occasion, and no second authority was ever given. If the bankers parted with the box without authority, the Defendants who are innocent cannot be held responsible for the consequences. No case can be found in which trustees have been held liable for the tortious act of persons with whom their trust funds have been properly deposited. It was argued, that if the Defendants had detected the first robbery, they would never have allowed *Ellis* to obtain the box a second time ; but, as it is, the Defendants never allowed *Ellis* to obtain the box a second time. That was the unauthorised act of the bank, and for its consequences the bank, not the Defendants, must be responsible.

Nor can those Defendants properly be held liable even to the extent of the £7,650 Deferred Stock, which *Ellis* withdrew from the trust property upon the occasion of the conversion.

(a) 22 Beav. 316.

(b) 27 Id. 568.

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 —
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THE VICE-CHANCELLOR.—Was it not their duty to ascertain that the £7,650 Deferred Stock, as well as the rest of the stock, was actually in the box when the box was returned to their joint custody, or to take proceedings to recover it or have it replaced? Are they not chargeable with laches for omitting that duty?

Mr. Jessel.—The question is, was their laches the cause of the Plaintiffs' loss? Would any amount of inquiry, after the box was returned in 1852, have enabled them to recover the £7,650 Deferred Stock which *Ellis* had withdrawn from the trust funds? Was not *Ellis* insolvent from the beginning? It is incumbent on the Plaintiffs, seeking to fix the Defendants with liability for not filing a bill to compel *Ellis* to replace what he had withdrawn, to show that by filing such a bill the Defendants could have recovered the fund: *Styles v. Guy* (a).

THE VICE-CHANCELLOR.—Rather, it is incumbent on the Defendants seeking to relieve themselves from liability under such circumstances, to show that by filing such a bill they would *not* have recovered the fund.

Mr. Jessel.—If so, that would be matter for inquiry. A trustee is not liable for omitting to file a bill against his co-trustee when that co-trustee, by his own tortious act, has made himself personally responsible. It would be a disastrous doctrine which should compel every new trustee upon his appointment to file a bill against all former trustees who may have committed a breach of trust.

To make a trustee responsible for loss occasioned by his co-trustee, there must have been gross negligence: he must have been cognisant of the breach of trust. In all the authorities the trustee was cognisant of the breach of trust; and either industriously concealed it, or failed to take active

(a) 4 Y. & Coll. Exch. 572; S. C., on Appeal, 1 M'N. & Gor. 422.

measures, which, if taken, would have protected the fund : *Lewin's "Law of Trusts and Trustees"* (a), *Brice v. Stokes* (b), *Walker v. Symonds* (c), *Oliver v. Court* (d), *In re Chertsey Market* (e), *Attorney-General v. Holland* (f), *Booth v. Booth* (g), *Williams v. Nixon* (h), *Blackwood v. Borrowes* (i). None of these authorities show that trustees are responsible for the tortious dealing of a co-trustee which no act on their part could have prevented.

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[He cited *Jones v. Lewis* (j). *Urch v. Walker* (k) was also referred to.]

Sir H. Cairns, Q.C., and Mr. Homersham Cox, for the Defendant *Guedalla*, supported the same contention.

The authorities establish that trustees may justify their conduct in the administration of a trust, where, as here, there existed what has been called a *moral necessity* for that conduct (l); and "moral necessity" has been thus defined by Lord *Hardwicke*: "Moral necessity is from the usage of mankind; if a trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business—as if a trustee appoint rents to be paid to a banker at that time in credit, but who afterwards breaks—the trustee is not answerable. So in the employment of stewards and agents. For none of these cases are on account of necessity, but because the persons acted in the usual method of business:" *Ex parte Belchier* (m). And Lord *Cottenham* says, "Necessity which includes the regular course of business will exonerate:"

(a) 4th ed., pp. 210, 211.

(b) 11 Ves. 319.

(c) 3 Swanst. 1.

(d) 8 Price, 166.

(e) 6 Id. 279.

(f) 2 Y. & Coll. Ch. 699.

(g) 1 Beav. 125.

(h) 2 Id. 472.

(i) 2 Con. & Law. 477.

(j) 2 Ves. Sen. 240.

(k) 3 My. & Cr. 702.

(l) *Lewin's "Law of Trusts and Trustees,"* 4th ed. 193.

(m) Amb. 219.

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 —
 Argument.

Clough v. Bond (a). Taking that as the test, the Defendants in this case are exonerated. They have adhered strictly to the regular course of business. The securities in question had been deposited by the testator at the same bank at which, after his death, the Defendants as his trustees allowed them to remain. And with regard to the conversion, *Guedalla* had a right to assume, both ante and post, that the bankers would not part with the securities for the purpose of conversion, without seeing them replaced by new securities to an equivalent amount. It cannot be gravely argued that all the three trustees were bound to attend at the bank of Sir *Samuel Scott & Co.* twice a year, when interest was payable, in order to prevent *Ellis* from taking more than the coupons. And if they were at liberty to rely upon his honour twice a year, when he had access to the box for the purpose of taking the coupons, they cannot be held responsible for having placed the same reliance upon his honour on the occasion of the box being entrusted to him for the purpose of effecting the conversion.

[They cited also *Leading Cases in Equity* (b), and *Cottam v. The Eastern Counties Railway Company* (c).]

Mr. *Rolt*, Q.C., in reply:—

The Defendants cannot exonerate themselves in respect of the second robbery, by arguing that the bankers had no authority to hand over the box to *Ellis* upon the second occasion. For four years they left *Ellis* in the absolute and uncontrolled possession of the key. The securities—unlike Consols and the other investments with which the Court has usually to deal—were payable to bearer, and passed by delivery; they differed in no respect from bank-notes or sovereigns; and by allowing *Ellis*, from 1852 to 1856, to be the sole possessor of the key, and to

(a) 3 My. & Cr. 490.

(b) Vol. 2, p. 742.

(c) 1 J. & Hem. 243.

have constant access to the box without even a solicitor to check his conduct, the Defendants left the trust property as destitute of protection as it would have been in *Ellis's* pocket. By leaving *Ellis* for four years with this absolute power over the trust property, the Defendants induced the bankers to suppose they were authorised to hand over to him a second time the box itself.

Here, therefore, the Defendants are liable to make good, not only the £7,650 Deferred Stock, but the amount which was withdrawn by *Ellis* after he had a second time possessed himself of the box.

Cur. adv. vult.

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Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

March 21st.
Judgment.

The question in this case is, whether the Defendants *Haim Guedalla* and *Jesse Brandon* are liable to make good the amount in value of certain *Spanish* Stock, payable to bearer, of which they and the Defendant *Samuel Helbert Ellis* were trustees, under the will of the testator *Joshua Israel Brandon*, but which the Defendant *Ellis* fraudulently withdrew from the trust funds, and appropriated to his own use.

The question divides itself into two branches: *first*, as regards the £7,650 Deferred Stock, which the Defendant *Ellis* withdrew from the trust funds in February, 1852, upon the occasion of the conversion; *secondly*, as regards the residue (£20,697 : 10 : 0 Deferred Stock, and £6,417 : 10 : 0 Passive Stock), which he restored to the bankers in 1852, but made away with subsequently, after he had a second time obtained possession of the box.

As regards the £7,650 Deferred Stock, it appeared to me extremely difficult, from the first, to contend that the

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Defendants *Guedalla* and *Jesse Brandon* are not liable in respect of the robbery committed by their co-trustee.

In January, 1852, the box containing the securities in their original form (viz. £24,480 *Spanish* Active Stock and £6,417 : 10 : 0 *Spanish* Passive Stock,) is lying at the bank of Sir *Samuel Scott & Co.*, deposited there, as the bankers are aware from Mrs. *Brandon's* letter of February, 1850, on account of the three trustees. In January, 1852, all parties interested under the will are desirous to take advantage of the proposal of the *Spanish* Government to convert the Active Stock, and the Defendant *Ellis*, a stock broker, is employed to effect the conversion. The bankers objecting, and very properly objecting, to part with the box to one of three trustees without the authority of the other two, Mr. *Lindo*—who has the key of the box, who was clearly the solicitor of Mrs. *Brandon*, and who, if he is not to be called the solicitor of all the three trustees, was clearly their agent, and was recognised as such by *Guedalla*—procures from Mrs. *Brandon* the letter of the 29th of January, 1852, to the bankers authorising them to let *Ellis* have the box “for the purpose of conversion.” By means of this letter *Lindo*, acting on behalf of all three trustees, procures the box to be delivered by the bankers to the Defendant *Ellis* for the purpose of the conversion.

After the conversion, Mr. *Lindo* thinks it his duty to see that the property is safely restored. But how does he discharge this duty? He says “After such conversion took place, I, as solicitor to the said *Jesse Brandon*, took steps to ascertain whether the new *Spanish* bonds procured by such conversion were duly deposited at the said bank. Accordingly, in the early part of the year 1852, shortly after such conversion took place, I called upon the Defendant *Ellis* at his office in *Throgmorton-street*; and in answer to my inquiries, he stated that the conversion had been completed and the box returned to the bank with all

the new bonds in it. I very shortly afterwards attended at the bank and made inquiry there, whether such new bonds had been so deposited. My said inquiries were addressed to one of the partners in the said firm—I believe, Mr. *Samuel Scott*. He referred to one of the clerks in the bank, and then replied that the said box had been returned to the bank. Such reply appeared to me perfectly satisfactory." *Ellis* tells him that the box has been returned to the bank with all the new bonds in it. He goes to the bank, and his duty there is to ascertain the truth of both statements, for they are both equally important; an empty box would be of no value. His duty is to ascertain, not only that the box is at the bank, but that all the new bonds are in it. Unhappily he does only one of these two things. He inquires "whether such new bonds had been so deposited." The answer of the banker is merely "that the box had been returned to the bank." The banker did not see that the bonds were in it, for he had not the key. Unhappily, though it is not to be wondered at, Mr. *Lindo* is satisfied with this answer. He trusted to *Ellis's* assurance, and, seeing the box safe at the bank, did not suspect that *Ellis* had committed so gross a robbery.

Mr. *Lindo's* affidavit then contains this most important statement with reference to the Defendants:—He says, "Immediately afterwards I informed the Defendant *Jesse Brandon* of the result of the inquiries, and I informed the Defendant *Haim Guedalla* upon his return to *England* shortly afterwards."

It was argued on behalf of the Defendant *Guedalla*, that he, at any rate, was not responsible. But *Guedalla* knew that the bonds were to be converted; he knew that the conversion had been effected. He knew that upon the conversion being completed he ought to have a certain amount of new bonds in his possession; that the trusts would follow the property in its converted form; and that

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it was as much his duty to ascertain that he had the requisite amount of property in its converted form as it was the duty of the Defendant *Ellis* to effect the conversion. He is told by Mr. *Lindo*, who watched, and seems to me, except for this unhappy omission, to have watched properly for all the trustees, that the conversion had been effected, and that the box was safe at the bankers. This is all I can suppose Mr. *Lindo* to have told him, this being all that Mr. *Lindo* learnt. *Guedalla* is satisfied with this statement. He makes no further inquiry himself, and he appears to me to adopt Mr. *Lindo* and to rest upon him as the person who was to discharge the duty for him, for otherwise he ought to have discharged it himself. Having adopted as his agent a person who has miscarried in the discharge of a duty which he ought himself to have discharged, he cannot improve his position by saying that he did not himself discharge it.

From 1852 to 1856, both *Guedalla* and Mrs. *Brandon* acquiesced in the imperfect inquiry made by Mr. *Lindo*; both stood by without taking any step to ascertain whether the new bonds ever came into the custody of the bank, acquiescing simply in the statement of their co-trustee *Ellis* that such was the case. It turns out that the statement was false; that *Ellis* had abstracted £7,650 of the new bonds, and to that extent it appears to me impossible to assert that either *Guedalla* or Mrs. *Brandon* is exempt from liability for the robbery which *Ellis* committed.

I cannot for a moment adopt the argument in support of which so many authorities were cited, that a trustee is not liable for the tort of his co-trustee. Of course he is not liable if he takes proper precautions, within reasonable time, to ascertain what his co-trustee has done with the property, and takes proper steps to recover any that has been made away with. But here nothing of the kind was done. The matter was allowed to sleep without any at-

tempt, except the imperfect attempt made through Mr. *Lindo*, to ascertain that the trust property was secure.

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Hitherto I have said nothing about the deed of the 31st of July, 1852, which expressly declares the trusts of the property in its converted form, because Mr. *Guedalla* says he did not execute that deed. As regards Mrs. *Brandon*, it is different. She did execute the deed, and she thereby expressly declares that she is a trustee of the whole of the new fund.

But, in fact, the omission of *Guedalla* to execute the deed of July, 1852, makes no substantial difference in his position. Knowing that a new fund was to be acquired, he must have known it to be his duty, in the exercise of that ordinary prudence which a man uses in his own affairs, to see that such new fund had been actually acquired. No man of ordinary prudence, who has instructed his broker to buy stock for him, would trust merely to the broker's statement, and omit to take any step to ascertain whether the stock has actually been bought. At least, a person who did so would not be a man of ordinary prudence in the sense in which this Court understands the term.

So far, therefore, as regards the £7,650 Stock, which the Defendants *Guedalla* and Mrs. *Brandon* neglected to see placed in the joint custody of the trustees when the box was returned to the bank, I must hold them liable to make good the loss which has been sustained.

The other part of the case stands in a very different position.

After the conversion in February, 1852, the box is returned to the bankers, with the whole of the trust property in it, except the £7,650 Stock which I have dealt with. I do not see what better course the trustees could have adopted for the protection of the property. They deposited it in a box with the bankers, in trust for all the three trustees. It was property payable to bearer, and which passed

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by delivery ; and with regard to property of that description (whether it be a plate chest, or whatever it may be), I know of no better course to take for protecting it than to deposit it at your bankers. It must be deposited somewhere. It cannot be in three houses at once.

The only other course which suggested itself to me was to deposit it in a box with three locks, opened by three different keys, one to be kept by each of the three trustees ; so that the box could not be opened without the permission of all the trustees. But where the interest of property is payable upon coupons, and twice a year, and the box must be opened twice a year for the purpose of obtaining access to the coupons, it is too much to say that a man of ordinary prudence in the management of his affairs would think it necessary, for the protection of the property, to adopt a course of that kind—knowing, as he would, that it would be the bankers' duty to see that the coupons only were taken out of the box on each occasion, and that neither the box itself nor the securities were removed.

Here the box stood at the bankers upon trust for all the three trustees. They held it expressly upon the terms of the letter of February, 1850, requesting them to hold it upon trust for all the three trustees. They ought not to have parted with it, or allowed more than the coupons to be taken out, without the authority of all the three trustees. Upon the former occasion, when the bonds were required for the purpose of conversion, they objected, very properly, to part with the box to one of the trustees, without a written authority from the other two, although eventually they were satisfied with an authority signed only by one. But afterwards, unfortunately, they neglected even that precaution. Without any authority from *Guedalla*, without any authority from Mrs. *Brandon*—for her letter of the 29th January, 1852, had merely authorised them to part with the box for the purpose of the conversion, which was already

effected—without any authority from Mr. *Lindo*, they handed over the box to *Ellis*; and when *Ellis* returned it to them, it was empty.

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—
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It is true, that while the box was with the bankers, Mr. *Lindo* had given *Ellis* the key; but I see no irregularity in *Ellis* being left in possession of the key, so long as the box was deposited safe at the bankers. The key must have been entrusted to some person, in order to get access half-yearly to the coupons; and to no person could it be entrusted for that purpose with greater propriety than to one of the trustees.

Upon what authority the bankers, who, under the letter of the 19th of January, 1852, had no power to deliver the box to *Ellis*, except for the limited purpose of converting the bonds, took upon themselves to hand over the box a second time to *Ellis*, after that purpose had been accomplished, I cannot understand. But, for the loss occasioned by their doing so, I cannot hold the co-trustees responsible. I can hold them responsible for not seeing that the £7,650, which it was their duty to see returned in the box and placed in their joint custody, was so returned and placed in their joint custody; but as regards the rest of the bonds, which *were* returned in the box and placed in their joint custody, I think they have done no act to withdraw them from that joint custody, or by which they could reasonably suppose they might be so withdrawn from their joint custody by the act of their co-trustee.

It seems to me, upon the commonest principles which regulate the liabilities of trustees, that the Defendants *Guedalla* and Mrs. *Brandon* must be fixed with liability with regard to the £7,650 Stock; and upon equally clear principles, that they must not be fixed with liability for the rest of the securities in question.

It occurred to me at one time as a possible argument in

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favour of the Plaintiffs' contention, that if the co-trustees had made the inquiry which I hold they ought to have made after the return of the box in 1852, they would have discovered the first delinquency on the part of *Ellis*; and had they discovered the first delinquency, the second would never have occurred. That is true, but the only way in which the omission of the co-trustees to make that inquiry enabled *Ellis* to commit the second delinquency was by enabling him first to impose upon the bankers, and induce the bankers to allow him to have possession of the box. And I am not aware that any Court has ever gone so far as to fix trustees with liability for the losses occasioned by the subsequent delinquencies of a fraudulent co-trustee, where those subsequent delinquencies have only been rendered possible by a process so circuitous.

With regard to costs, I do not think this is a case for splitting the costs, since they have not been increased by the evidence as to the bulk of the securities. The trustees therefore must pay the costs of the suit; but I shall direct the Taxing Master to have regard to the prolixity of the affidavits on the part of the Plaintiffs, in which I observe the most improper course has been adopted of setting out instruments verbatim.

I have, therefore, drawn up the Minutes in this form :—

Minute of
 Decree.

DECLARE that the Defendants *Guedalla*, *Ellis*, and *Jesse Brandon* are jointly and severally liable to make good the amount in value of the sum of £7,650 *Spanish* Deferred 3l. per cent. Stock, which was withdrawn from the trust funds in the pleadings mentioned by the said *Ellis* and sold, and the proceeds applied to his own use on the day of February, 1852.

BUT that the Defendants *Guedalla* and *Jesse Brandon* are not liable to make good the value of the remaining sum of £20,697 : 10 : 0 3l. per cent. Deferred Stock, or the sum of £6,417 : 10 : 0 *Spanish* Passive Stock, which were respectively afterwards withdrawn from the custody of Sir *Samuel Scott & Co.*, the bankers of the said Defendants *Guedalla*, *Ellis*, and *Jesse Brandon*, without the privity or concurrence of the said Defendants *Guedalla* and *Jesse Brandon*.

DECLARE that the said *Ellis* is liable to make good the value of such lastly-mentioned sums of £20,697 : 10 : 0 *Spanish* Deferred 3*l.* per cent. Stock, and £6,417 : 10 : 0 *Spanish* Passive Stock, as from the same day in February, 1852, when he removed the same from the custody of the said bankers; and also that, as between him and his co-trustees, he is liable to answer for so much of the value of the said sum of £7,650 *Spanish* Deferred 3*l.* per cent. Stock as they may respectively make good.

ASCERTAIN the value of the lastly-mentioned sum of £7,650 *Spanish* Deferred 3*l.* per cent. Stock on the day of February, 1852, and what amount of 3*l.* per cent. Consolidated Bank Annuities could have been purchased therewith on the same day of February, 1852, and what amount of dividends would have accrued due on such 3*l.* per cent. Consolidated Bank Annuities since the day of February, 1856, up to which time sums equal to the dividends of such lastly-mentioned *Spanish* Deferred 3*l.* per cent's. were paid to the parties interested in the said trust funds.

A LIKE direction (if required), as to the Defendant *Ellis's* delinquencies, the amount of stock, and the dividends thereon.

LET the Defendants *Guedalla*, *Ellis*, and *Jesse Brandon*, within a month from the date of the certificate, transfer and pay into Court, to the credit of the cause, the amount of stock and dividends respectively, to be certified by the Chief Clerk in pursuance of the above inquiries.

DEFENDANTS *Guedalla*, *Ellis*, and *Jesse Brandon*, to pay the costs of the suit, subject as above.

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Jan. 24th & Feb.
11th.Pleading—De-
murrer & Plea
—37th Order
of Aug. 1841.Notwithstanding
the 37th
Order of Aug.
1841, a Defend-
ant is not at li-
berty to plead to
the whole bill,
and also to de-
mur to the
whole bill.Jurisdiction—
Joint Stock
Companies Acts
—19 & 20 Vict.
c. 47, s. 60—20
& 21 Vict. c. 14,
s. 19—21 & 22
Vict. c. 60.—
Limited Com-
panies—Volun-
tary winding-up
—Voluntary
Liquidators—
Jurisdiction for
Protection of
Assets—Court
of Bankruptcy
—Injunction.A creditor of
a limited com-
pany, in course
of being wound
up voluntarily,
may file his bill
in this Court to
have his claim
declared valid,
and to restrain
the voluntary
liquidators
from expending
the assets of the
company in
paying other
debts of the
same degree.Plea to such
a bill, that by
the Joint-Stock
Companies Acts,
1856, 1857, and 1858, the cognizance of the matters in question belongs to the Court of Bank-
ruptcy, overruled with costs.

12 89 23 4

LOWNDES v. THE GARNETT & MOSELEY GOLD
MINING COMPANY OF AMERICA (LIMITED).

THE bill was filed by *William Lowndes*, claiming to be a creditor of the Defendants *The Garnett & Moseley Gold Mining Company of America* (limited), as Plaintiff, against the company, and *Peter Henry Rooke*, *Loftus Lee Pemberton*, and *Charles Phelps*, who had been appointed liquidators for the voluntary winding-up of the affairs of the company, as Defendants.

The bill stated that the company was established for the purpose of working mines in *America*, under a deed of settlement dated 1853, registered in accordance with the 7 & 8 Vict. c. 110, in January, 1854; was duly registered in *England* as a company with limited liability, under the Joint Stock Companies Act 1856, in September, 1856; and had always had its principal place for carrying on business in *London*.

The bill then stated, that, in the years 1854 and 1855, the Plaintiff, who was a shareholder in the company, had accepted, for the accommodation of the company, four bills of exchange, upon which he had paid in 1855 and 1856 the following sums £1,247 : 14 : 0, £1,000, £601 : 17 : 9, and £400; the whole of which, with interest at 5l. per cent., was still due and owing to him from the company; and that the company had, by a minute of the 4th of June, 1859, and otherwise, within six years of the filing of the bill, acknowledged and promised to pay the said debts.

The bill then stated, that, on the 23rd of November, 1860, at an extraordinary general meeting of the company, it was

resolved that the company should be wound-up voluntarily; and that at a like meeting in January, 1861, the said resolution requiring the company to be wound-up voluntarily was duly confirmed; and the Defendants *Rooke Pemberton*, and *Phelps*, were appointed liquidators for the purpose of winding-up the affairs of the company, and had ever since continued in such office.

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The bill then contained the following charge :—"The said liquidators have in their custody property and effects of the said company to a large amount, and have partly wound-up and are proceeding to complete the winding-up of the affairs of the said company, excluding the said debts and interest due the Plaintiff, and in preference thereto have paid and continue to pay other debts of the said company of the same degree. The Defendants threaten and intend to complete such winding-up, and to apply all the assets of the said company in payment of such other debts, without paying the said debts and interest due to the Plaintiff or any part thereof, unless restrained by the injunction of this Honourable Court. The assets of the said company, including the sums payable by its contributories, are not sufficient to pay all its debts and liabilities, but are sufficient to pay a large part thereof."

The bill stated that the Defendants refused to pay the debts and interest due to the Plaintiff, upon the ground that they considered his claim barred by the statutes of limitation.

The bill prayed—(1) That it might be declared that the said debts of £1,247 : 14 : 0, £1000, £601 : 17 : 9, and £400, with interest at 5*l.* per cent. from the respective times of payment by the Plaintiff, were valid and subsisting debts of the company to the Plaintiff. (2) That the Defendants might be restrained from paying, in preference to the said debts due to the Plaintiff, any other debts of the company of the same degree, and from completing such winding-up

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without paying or providing for the said debts due to the Plaintiff. (3) That, if necessary, such voluntary winding-up might be continued, subject to the directions of the Court. And (4) That all directions, accounts, and inquiries, necessary and proper for effectuating the purposes of the suit, might be given, taken, and made.

Statement.

The Defendants put in a demurrer and plea, by which, after demurring generally to the bill for want of equity, they proceeded to plead as follows:—"And these Defendants, not waiving their said demurrer but wholly relying thereon, do plead to the said bill, and for plea say, that it appears by the complainant's own showing, and is the fact, that *The Garnett & Moseley Gold Mining Company of America* (limited), was established for the purpose of working mines in *America*, and was duly registered in *England* as a company with limited liability, under the Joint Stock Companies Act 1856; and that the said company has always had its principal place for carrying on business in *London*. And these Defendants are advised, that by the Joint Stock Companies Act 1856, the Joint Stock Companies Act 1857, and the Joint Stock Companies Act 1858, the cognizance of the matters in question in this suit doth properly belong to the Court of Bankruptcy acting in *London*, and that the same ought to be tried and determined in that Court, and ought not to be brought into question in this Court.

Jan. 24th.

The demurrer and plea now coming on to be argued, Mr. *Homersham Cox*, for the Plaintiff, took a preliminary objection, that the Court could not hear the case upon demurrer and plea, inasmuch as the plea to the jurisdiction overruled the demurrer to the whole bill.

*Argument on
 Demurrer and
 Plea.*

Mr. *John Pearson* for the Defendants, in support of the demurrer and plea:—

Under the 37th Order of August, 1841 (Consol. Ord. xiv. 9), it is competent to demur and plead at the same time to the whole bill. The Order provides that no demurrer or plea shall be held bad and overruled only because the answer of the Defendant extends to some part of the same matter as is covered by such demurrer or plea. *Wyllie v. Ellice* (a) decides that an answer to an original bill, though it covers all the material allegations of the bill as amended, does not overrule a demurrer to the amended bill, as it would have done before the 37th Order. This will equally apply to the case of a plea and demurrer covering the whole bill.

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The VICE-CHANCELLOR referred to *Attorney-General v. Cooper* (b).

Mr. Pearson.—In that case the bill was amended, and a demurrer put in which might have been put in to the original bill, and the Vice-Chancellor says, that in *Wyllie v. Ellice* he thought that, since the 37th Order, the mere fact of answering part of a bill which was covered by the demurrer, was not a ground for overruling the demurrer. *Skey v. Garlike* (c) and other cases of that class only decide that you can't take advantage of the Order to get further time than you would otherwise have had, and we are not attempting to gain time; the Plaintiff, in fact, being benefited by the form of pleading, because, if the plea is bad in substance, the objection which could have been taken after a demurrer is now taken at an earlier stage. That time was the question in that case is evident, from the reference to the 16th Order of May, 1845. In *Esdvile v. Molyneux* (d) again the plea was clearly bad, independently of the question on the 37th Order, and that case is no obstacle to my contention.

[He also cited *Jones v. Strafford* (e).]

(a) 6 Hare, 505. (b) 8 Hare, 166. (c) De G. & Sm. 396.
(d) 10 Jur. 852. (e) 3 P. Wms. 78.

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Mr. *Pearson* offered to strike out the plea, and argue the demurrer alone.

Mr. *Cox* declined to consent to this.

VICE-CHANCELLOR SIR W. PAGE WOOD.—All that I can do is to overrule the demurrer, reserving the costs. The 37th Order, of August, 1841, directs that no demurrer shall be held bad only because the answer extends to some part of the same matter. I think it clear, that it was never intended to sanction a demurrer to the whole bill and a plea to the whole at the same time. The Order does not touch this case. Here it is not a question of some part of the same ground being covered by two defences, but each defence goes to the whole bill. The authorities cited have no bearing on such a case as this, because the judgment in *Wyllie v. Ellice*, which was chiefly relied on, is explained in the subsequent case of *Attorney-General v. Cooper*, to have turned upon the fact, that the amended bill was totally different from the original bill as regards the parties to the suit. On that ground the demurrer was filed, and then the technical objection was raised, that the answer to the original bill overruled the demurrer to the amended bill; and upon that the Court held, in effect, that the bill was not the same bill as that which had been answered, and therefore that the Defendant was entitled to demur to it, although he had answered part, but part only, of the bill as amended. This is the result of the case as explained by *Attorney-General v. Cooper*. *Esdaile v. Molyneux* raised a similar question, and there the decision did not turn upon time, as in *Skey v. Garlike*. It was a mere plea to the whole bill, on which the Vice-Chancellor observed, that the plea was not a negation or a displacement of facts introduced by the amendment; that it was not a plea of any matter alleged to have happened or to have come to the Defendant's knowledge since the original

bill filed. This clearly implies, that if the plea had been of that description, the Order might have applied. But the Vice-Chancellor goes on to say, that it was a plea of matter which, if pleadable, was pleadable in bar originally to the whole of the bill. Therefore the Vice-Chancellor considered that the Order did not affect the case. Here I cannot hold the Order, which allows a demurrer to stand though part of the matters covered by it are answered, to be applicable to the case of a demurrer and plea both going to the whole bill, because, after a demurrer was overruled, the plea would remain as a second dilatory, and the Plaintiff would not get his answer on the demurrer being overruled, as he ought to do. The demurrer, therefore, must be overruled. Under the circumstances of this case, however, I must reserve the costs.

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Demurrer overruled. Costs reserved.

The cause now came on to be argued upon the sufficiency of the plea.

Feb. 11th.

Mr. John Pearson for the Defendants:—

The plea must be allowed. This is, in effect, a bill to wind up a limited company registered in *England*; and by the Joint Stock Companies Acts, the jurisdiction to wind up such a company is in the Court of Bankruptcy, and not in the Court of Chancery.

Argument
on the Plea.

THE VICE-CHANCELLOR.—The second paragraph of the prayer is for an injunction to restrain the voluntary liquidators from paying, in preference to the debts due to the Plaintiff, any other debts of the company of the same degree. I do not know what has taken away the jurisdiction of the Court upon bill filed—not, observe, upon peti-

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tion—to grant such relief. And if any portion of the relief prayed can be granted, the plea must be overruled.

Mr. *Pearson*.—Substantially this is a bill to wind up the company. And as regards the injunction sought by the second paragraph of the prayer, that relief could be obtained as well in Bankruptcy as in Chancery.

The third paragraph of the prayer, “that, if necessary, the voluntary winding up may be continued, subject to the direction of the Court,” is obviously intended to bring the case within the jurisdiction given by the 19th section of the Joint Stock Companies Act, 1857 (a), and under the mistaken impression, that in that section the expression “the Court” means the Court of Chancery: whereas, it is clear from the 60th section of the Act of 1856 (b), which is to be construed as one Act with the Act of 1857 (c), that the expression “the Court” means the Court of Bankruptcy; the 60th section enacting that the expression “the Court” shall mean, in the case of a limited company registered in *England*, and which is not engaged in working any mine within and subject to the jurisdiction of the Stannaries, “the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situated.”

(a) The 19th section of this Act (20 & 21 Vict. cap. 14) is as follows:—“Where a company is in course of being wound up voluntarily, and proceedings are taken for the purpose of having the same wound up by the Court, the Court may, if it thinks fit, notwithstanding that it makes an order directing the company to be wound up by the Court, provide in such order or in any other order for the adoption of all or any of the proceedings taken in the course of the volun-

tary winding up. It may also, instead of making an order that the company should be altogether wound up by the Court, direct that the voluntary winding up should continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just.”

(b) 19 & 20 Vict. c. 47.

(c) See 20 & 21 Vict. c. 14, s. 2.

The Plaintiff's claim is a purely legal demand ; there may be an indefinite number of like demands ; and if this bill lies, as many more may be filed to-morrow as there are creditors of the company.

Under the 14th section of the Act of 1858 (a), the Plaintiff might have obtained a decision from the Court of Bankruptcy upon all the questions involved in his claim, that section providing, that, where a company is being wound up voluntarily, the liquidators may apply to the Court (meaning, as before, the Court of Bankruptcy), by petition, motion, or the presentation of a special case, or in such other manner as the Court may direct, to determine any question arising in the matter of such winding up.

Mr. *Homersham Cox*, for the Plaintiff, was not called upon.

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VICE-CHANCELLOR SIR W. PAGE WOOD :—

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It is clear to me that this plea cannot be sustained.

It was argued that the Plaintiff might have taken proceedings in bankruptcy, and might have obtained from the Court of Bankruptcy all the relief he can obtain by this bill. But the question I am called upon to decide is, whether, in order to obtain that relief, he is compelled to take proceedings in bankruptcy. The question is not whether the Court of Chancery is to open its doors, but whether it is to shut them—not whether it is to assume jurisdiction ; but whether it is deprived of jurisdiction by the mere circumstance of the company being in course of being wound up voluntarily.

By confirming the resolution that their affairs should be wound up voluntarily, the company have shown that they have no wish to be wound up under an order of the Cou

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of Bankruptcy. The Plaintiff has no wish to compel them to adopt that course. But he does wish his claim against the company to be adjudicated upon; and that, pending the decision upon the validity of his claim, the voluntary liquidators may not be allowed to expend the assets of the company in paying other debts of the same degree in preference to his claim. He states by his bill, and the plea does not deny, that the Defendants threaten and intend to take that course. And it is impossible to doubt, that if they do so, the Plaintiff, in the event of his claim proving valid and subsisting, will be greatly injured. And the question I have to determine is, whether the Plaintiff is to be deprived of relief in this Court, merely because there *may be*—it is not averred that there *are*—an indefinite number of similar claims which other creditors may bring against the company.

Without determining the question which was raised upon the construction of the expression “the Court,” in the 19th section of the Act of 1857 (a), it is sufficient for me to say that I find nothing in that section, or in any other section of the Acts in question, which requires me to hold that the mere circumstance of a limited company having preferred a voluntary to a compulsory process of winding up their affairs, is sufficient to compel a creditor who seeks adjudication upon the validity of his claim, and asks the interference of this Court to protect the assets of the company until such adjudication has been obtained, to have recourse to the Court of Bankruptcy for the purpose of obtaining that relief.

The plea, therefore, will be overruled, and upon the usual terms as to costs.

*Minute of
 Order.*

PLEA overruled—Costs of demurrer and plea to be paid by Defendants.

(a) 20 & 21 Vict. c. 14.

4, 89, 203
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THOMPSON v. WATTS.

THIS suit was instituted by *Mary Thompson*, the widow of *Edward Thompson*, deceased, against *John Watts* and *Anne*, his wife, and *George Corser* and *Amy*, his wife (the said *Anne* and *Amy* being the only children, and also the sole legal personal representatives of the deceased), for the purpose of obtaining the judgment of the Court upon the following question, viz., Whether, in addition to the provision made for her by the settlement executed in contemplation of her marriage with the said *Edward Thompson*, the Plaintiff was entitled, as his widow, to one-third distributive share of the clear residue of his personal estate and effects.

It appeared that, at the date of the settlement in question, *Edward Thompson* was a widower with two children, the Defendants *Anne Watts* and *Amy Corser*.

The indenture of settlement was made the 31st of July, 1860, between the Plaintiff, then *Mary Weale*, spinster, of the first part, *Edward Thompson*, of the second part, and *Charles Dolben* and *John Watts*, of the third part; and thereby, after reciting the intended marriage, and that the Plaintiff was entitled to a Government annuity of £59 : 8 : 6 for her own life, and also six original and six new shares in the *Birmingham & Staffordshire Gas Company*, and £1035 or thereabouts stock, shares, or debentures in the *London & North-Western Railway Company*, fifteen shares in the *Leamington Priors Gas Light & Coke Company*, household goods, and furniture and other effects; and that upon the treaty for the marriage it was agreed and intended that all the property of the Plaintiff (except the said annuity and her linen, jewel-

charged on personalty of the intended husband, who had children by a former marriage—*Held*, on his dying intestate, that the claim of his widow to a distributive share in his personal estate was barred by a stipulation in the above words.

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Mar. 11th, 12th.

Marriage Settlement—Construction—Husband and Wife—Provision “in lieu of Dower or Thirds”—Statutes of Distribution—Widow’s Share under, whether barred.

The word “thirds” is not confined to real estate, but is a general expression, which may signify, according to the context and scope of the instrument, the interest of a widow in any property, whether personal or real, of her deceased husband.

In construing a stipulation in a marriage settlement, that the provision thereby made for the intended wife is “in lieu of dower or thirds,” the Court considers (inter alia) the fund out of which the provision was made.

Where, therefore, by antenuptial settlement, the provision thereby made for the intended wife was partly

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lery, and trinkets, which were to remain her separate property, to be at her absolute disposal notwithstanding coverture,) should become the property of *Edward Thompson*, on his covenanting and agreeing, as thereafter mentioned, to pay the Plaintiff, her appointees, executors, administrators, or assigns the sum of £2,000 within six months after his decease, and also securing to the Plaintiff the sum of £240 : 11 : 6 per annum during her life, and charging the same upon an estate belonging to him, situate at *Long Buckby*, in the county of *Northampton*, and upon 400 shares which he then held and was entitled to in the *Rock Life Assurance Company*, It was witnessed, that, in contemplation of the intended marriage and for the considerations thereinbefore and thereafter mentioned, the Plaintiff assigned to *Dolben* and *Watts* the said Government annuity of £59 : 8 : 6, payable to the Plaintiff during her life, and the certificate No. 38,741 respecting the same, upon the trusts therein-after mentioned. And the Plaintiff thereby assigned to *Edward Thompson* her said stock, shares, and debentures in the companies thereinbefore mentioned, and all other the personal estate and effects then belonging to her the Plaintiff (save and except as therein aforesaid), and which personal estate and effects thereby assigned amounted in value to £2,500, to hold the same to *Edward Thompson*, his executors, administrators, and assigns. And it was thereby declared that *Dolben* and *Watts* should stand possessed of the annuity and proceeds, upon trust to pay the same to the Plaintiff and her assigns during her life for her sole and separate use. And by the same indenture the estate and premises at *Long Buckby* were conveyed and assured by *Edward Thompson* to *Dolben* and *Watts*, their heirs and assigns, upon the trusts thereafter mentioned. And by the same indenture *Edward Thompson* assigned and transferred to *Dolben* and *Watts* the said 400 shares in the *Rock*

Assurance Company upon the trusts thereafter declared; and *Edward Thompson* thereby covenanted with *Dolben* and *Watts* that his heirs, executors, or administrators should, within six months after his decease, pay to the Plaintiff, her appointees, executors, administrators, and assigns, the said sum of £2,000. And it was thereby declared, that *Dolben* and *Watts* should stand possessed of the estate and premises at *Long Buckby* and the shares in the *Rock Assurance Company*, upon trust to raise the said sum of £2,000 in case the same should not be paid to them by *Edward Thompson* pursuant to the covenant thereinbefore contained; and upon receipt thereof to pay the same to the Plaintiff, her appointees, executors, administrators, and assigns, in case she should survive *Edward Thompson*; but in case she should die in his lifetime, then upon trust to pay the said sum of £2,000 unto such person as the Plaintiff, whether coverte or sole, should by deed or will appoint; and in default of appointment, to the executors, administrators, and assigns of the Plaintiff; and upon further trust, that *Dolben* and *Watts* should, after the decease of *Edward Thompson*, receive the rents of the estate and premises at *Long Buckby*, and apply the same in or towards payment to the Plaintiff and her assigns, during her life, of an annuity of £240 : 11 : 6; and upon further trust that *Dolben* and *Watts* should stand possessed of the remainder of the money to arise and be received from the shares in the *Rock Assurance Company*, or so much as might be necessary for the purpose, and invest the same at interest on Government or other good and approved security, and receive the dividends, interest, and proceeds thereof, and pay and apply the same in paying and making up to the Plaintiff or her assigns so much of the said annuity of £240 : 11 : 6 as the rents, issues, and profits of the estate and premises at *Long Buckby* should be insufficient to pay, and to pay the residue (if any) to the exe-

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cutors, administrators, or assigns of *Edward Thompson*; and upon trust, from and after the decease of the Plaintiff, to reconvey and reassign the said lands, shares, and moneys, or so much and such part thereof as might be undisposed of, unto *Edward Thompson*, his heirs, executors, administrators, and assigns. And after other provisions, immaterial to the present question, the indenture contained a clause in the following words: "and it is hereby declared and agreed that the provision herein made for the said *Mary Weale* is in lieu of dower or thirds."

By another indenture, also bearing date the 31st of July, 1860, and made between the Plaintiff of the one part, and *Edward Thompson* of the other part, certain hereditaments belonging to the Plaintiff, of the net annual value (after deducting repairs, expense of collection, income tax, and every other payment) of £100 or thereabouts, were, in consideration of the intended marriage, conveyed by her to the use of *Edward Thompson*, his heirs and assigns, for his and their own use.

The marriage was solemnized on the 1st of August, 1860.

Edward Thompson died on the 28th of December following, intestate, leaving his widow (the Plaintiff) and the Defendants *Anne Watts* and *Amy Corser*, his daughters by his first wife, his only children and next of kin, him surviving.

On the 12th of August, 1861, letters of administration to the personal estate and effects of *Edward Thompson* were granted to *Anne Watts* and *Amy Corser*.

The intestate left personal estate and effects to an amount exceeding £6,000, over and above what was required for his funeral and testamentary expenses, and debts.

The Plaintiff prayed by her bill that it might be declared, that, besides and in addition to the provisions made for her by the indenture of settlement, she was entitled, as the widow of *Edward Thompson*, to one-third share of the residue of his personal estate, after payment of his debts, funeral and testamentary expenses; and that the sum of £2,000, provided for the Plaintiff by the said indenture, was not to be taken as part of such her third share.

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Mr. *W. M. James*, Q.C., and Mr. *Wickens*, now moved for a decree in terms of the prayer of the bill.

Argument.

Both upon principle and authority the stipulation in the settlement, that the provision thereby made for the Plaintiff "is in lieu of dower or thirds," must be construed as referring exclusively to real estate. It cannot refer to the distributive share of the Plaintiff in her late husband's personalty.

Independently of authority, the Court will presume, that, by a stipulation like the present, the husband intended to bar his wife of some rights, which after marriage he would not be able to bar, or would not be able to bar so easily. As to rights which he could bar as easily after marriage by making his will, as he could bar them before marriage by a settlement, nothing would be gained by stipulating before marriage that they should be barred. The Court, therefore, will not presume a husband to have meant to bar such rights, unless he has used apt expressions for that purpose.

The word "thirds" is not an apt expression to use, for the purpose of denoting the widow's distributive share in the personal estate of her late husband. Properly speaking, it is restricted to real estate. It is a term more comprehensive than "dower," and would comprise free-bench and the widow's interest in customary lands. The

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origin of the word was feudal; and "triens" or "tertia" was the feudal term for dower (a). According to *Finch*, "Dower is an estate whereby the woman hath the thirds in severaltie" (b). Having come down from early times with a signification restricted to real estate, *primâ facie*, the word "thirds" must be presumed to be so restricted.

Here, so far from there being circumstances to induce the Court to extend its *primâ facie* meaning, all the circumstances have a contrary tendency. It occurs in a deed. By that deed, and the instrument of even date, the intended wife makes over the whole of her property, real and personal, with the exception of her trinkets and of a few other specified articles, to her husband absolutely; she bars herself of dower, but she has purchased whatever interest in his personal estate her husband may not have thought fit to alienate from her by will. The Court will not make this a harder bargain for the wife than the words require. The husband having chosen to die intestate, the Court will infer it to have been as much his intention that his widow should take her distributive share, as if he had expressly bequeathed it to her.

The VICE-CHANCELLOR.—The expression "the widow's thirds," is a common phrase to denote her share under the Statutes of Distribution.

Mr. *James*.—It is an inapt expression for that purpose: the widow's share under the statutes is not necessarily a third; it may be more: if her husband leaves no child, her share under the statutes is a moiety and not a third.

Then as regards the authorities: *Colleton v. Garth* (c) is the only case to be found in the books, where, as here, the stipulation in question makes no mention of either real or personal estate. In *Davila v. Davila* (d), *Druce v. Denison* (e),

(a) 1 Steph. Com. 4th ed. p. 267.

(c) 6 Sim. 19.

(b) *Finch's "Discourse on Law,"*
 p. 126.

(d) 2 Vern. 724.

(e) 6 Ves. 385.

and *Gurly v. Gurly* (a), the words "real and personal" estate were expressly added, which compelled the Court to hold, that the word "thirds" was used in a sense differing from its ordinary signification. *Colleton v. Garth* is the only case in point, and there Vice-Chancellor *Shadwell* held it clear, that the word "thirds" referred exclusively to the husband's lands; and the decree declared that the widow was not barred of her distributive share in the personalty of her late husband.

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Secondly, we contend that the £2,000 covenanted to be paid to the Plaintiff or her appointees upon her husband's death, is not to be taken in part satisfaction of her distributive share.

This case is not like *Gartshore v. Chalie* (b), for here the covenant was to pay the £2,000 to the wife or her appointees, irrespective of the question whether she survived her husband. The wife might have appointed the fund to a stranger the day after her marriage, and had she done so the covenant in question could not have deprived her of her distributive share.

Mr. *Rolt*, Q.C., and Mr. *Hobhouse*, for the Defendants :—

First, by the stipulation in question, the Plaintiff is barred of her distributive share in the personal estate of her late husband.

"The word 'thirds' is never used accurately : It is a sort of expression, in common parlance, descriptive of the interest upon an intestacy : " per Lord *Eldon* in *Druce v. Denison* (c). True, it may have a specific and more restricted sense, but that does not deprive it of its general signification.

It was argued, that the word "thirds" cannot mean the

(a) 8 Cl. & F. 743.

(b) 10 Ves. 1.

(c) 6 Ves. 394.

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widow's share under the Statutes of Distribution, because, if there be no child, her share under the statutes is not a third but a moiety. But the Plaintiff's counsel admit that the word includes the widow's freebench, and freebench is not confined to a third, but may be the whole: *Walker v. Walker* (a).

[They cited also *Druce v. Denison* (b), *Gurly v. Gurly* (c), *Glover v. Bates* (d).]

Secondly, if the Plaintiff is not barred of her distributive share, the £2,000 must be taken in part satisfaction of that share: *Gartshore v. Chalie* (e).

Mr. James, Q.C., replied.

The Court reserved judgment.

March 12th.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This case is one of some novelty. Although many of the authorities cited in argument have some bearing upon it, the precise point does not seem to have yet been decided.

The Plaintiff being about to marry a gentleman who was a widower with children, an indenture of settlement is executed, which is to the following effect :—[The Vice-Chancellor stated the effect of the settlement as above set forth.]

The question to be determined is, whether the word "thirds," in the declaration at the close of the settlement, includes the distributive share of the Plaintiff in the personal estate and effects of her late husband who has died intestate.

(a) 1 Ves. Sen. 54.
 (b) 6 Ves. 385.

(c) 8 Cl. & F. 743.
 (d) 1 Atk. 439.

(e) 10 Ves. 1.

Before discussing the authorities, no one of which, except *Colleton v. Garth* (a), appears to bear precisely upon the question, it was argued on behalf of the Plaintiff, that a man about to marry must be presumed, a priori, to have intended, by a stipulation like the present, to bar his wife of some right which after marriage he could not bar, or could not bar so easily; that, as to rights which he could as easily bar after marriage by making his will, as he could defeat them before marriage by an express stipulation in his marriage settlement, nothing would be gained by such a stipulation; and that, therefore, the Court will not presume him to have meant to bar such rights in the absence of a clear declaration to that effect.

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The answer to that argument is to be found in *Davila v. Davila* (b). There the husband covenanted, if his wife survived him, that his executors should pay her £1,500 "in full of dower, thirds, custom of *London*, or otherwise, out of his real or personal estate." But the Lord Chancellor considered that no such presumption arose. The intended husband might wish to provide, that, in the event of his will being revoked, as it would be by the birth of a child, his widow should be excluded from participating with his next of kin, without the necessity of his making a fresh will for that purpose.

If that was a sufficient answer under the old law, it is of ten-fold force now that marriage alone revokes a will. By the law as it now stands, the mere fact of marriage renders a man intestate. Aware of this state of the law, and foreseeing that he would not probably make a new will for a short time after his marriage, the intended husband might naturally wish to stipulate by his marriage settlement, that the provisions thereby made for his intended wife should be in lieu of every interest she could take in

(a) 6 Sim. 19.

(b) 2 Vern. 724.

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his personal as well as in his real estate in the event of his dying intestate; and that the whole of his personal estate should go exclusively to his next of kin.

This brings me to the authorities: and after ascertaining from the authorities what force has been given to the word "thirds," it will be necessary to consider the scope of the settlement before me, and judge what effect should be given to the word "thirds" in this particular instrument.

The authorities are clear, that when it is stipulated that the provision made for the intended wife is to be "in lieu of dower or thirds of *real estate*" without more, the stipulation is confined to real estate, and the wife's interest in the personal estate of her husband in the event of his dying intestate is not barred.

On the other hand, where it is stipulated that the provision made for the intended wife is to be "in lieu of dower or thirds of *real and personal estate*," there the authorities have as clearly settled that the wife's interest in the personal estate of her husband, upon his dying intestate, is barred. That seems to have been decided as long ago as *Davila v. Davila* (a), though very frequently disputed since.

Indeed, such is the effect of a stipulation like the last, that, even if the words "which she might claim *at common law*" be added, the wife's distributive share in the personal estate of her intended husband will be no less barred. This was decided by the House of Lords in *Gurly v. Gurly* (b), where upon marriage a sum was settled in trust for the wife for life, "as and for her jointure, in full, lieu, bar, and satisfaction of any dower or thirds which she could or might claim at common law out of all or any of the estates, real, personal, or freehold," of her intended husband:—the Lord Chancellor observing that the words "common

(a) 2 Vern. 724.

(b) 8 Cl. & Fin. 743.

law" could not be interpreted in their strict sense, and as contra-distinguished from statute law, because in that case they would be insensible; they must, therefore, be construed as equivalent to "general law"—"law as distinguished in ordinary parlance from equity;" otherwise the word "personal" would have no meaning.

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Judgment.

A stipulation in the precise words of the case before me, which makes no mention of either real or personal estate, appears from the authorities to have occurred only once for decision, namely, in *Colleton v. Garth* (a). There the husband before marriage settled on his intended wife a rent charge, which by the settlement was declared to be "for her jointure, and in lieu of dower and thirds at common law." Vice-Chancellor *Shadwell* said: "It is clear that the rent charge was intended to be in lieu only of any claim which the wife might have upon her husband's lands;" and accordingly he declared that the widow was not barred of her distributive share.

Looking to that settlement, I think there could be no doubt upon the question. The provision settled by the husband on the wife was a "rent-charge," a charge on land; it was declared by the settlement to be "for her jointure;" and it was clear upon the settlement that the declaration related to real estate and real estate only. In the case before me, the provision made for the intended wife is charged upon personal property of the intended husband as well as upon his lands.

In *Pickering v. Lord Stamford* (b), I find an observation of Lord *Alvanley's* which is material, although the principle upon which that case was eventually decided does not touch the point before me. Lord *Alvanley* says, "In case of a contract before marriage, that the wife shall not claim

(a) 6 Sim. 19.

(b) 3 Ves. 332; S. C., affirmed on Appeal, Id. 492.

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either dower or personal estate, it is not merely to give the husband the power to dispose of it; for it is determined upon the custom of *London*, that she shall be barred though he does not give it away. It is exactly as if there was no wife; and the next of kin take without any reference to her" (a). In other words, the very object of such a settlement is to relieve the intended husband from the necessity of making a will, and to give his personalty, if he happens to die intestate, to his next of kin, as if there were no wife at all in question.

In *Druce v. Denison* (b), where the intended wife, by the settlement, agreed to accept the provision thereby covenanted to be made for her "in lieu, bar, and satisfaction of all dower or thirds which she might otherwise be entitled unto out of all the real and personal estate" of the intended husband, it was ingeniously argued, on the part of the widow, that the agreement was entered into with a view to the event of there being children of the marriage, in which case, in the absence of such an agreement, she would have been entitled, upon the decease of her husband intestate, to one third of his personal estate; but a third of his personal estate was not the portion to which she was entitled in the event which had happened, of there being no child of the marriage; for in that event she was entitled to a larger portion (c). But Lord *Eldon* said, "As to the word 'thirds' the clear intention must be taken to mean her interest in case of intestacy. If that word did not occur, I doubt whether the personal estate would not have been included under the word 'dower.' The word 'thirds' is never used accurately. It is a sort of expression in common parlance descriptive of the interest upon an intestacy. It must depend upon the domicile. The Plaintiff's argument is too ingenious upon the construction of a settlement, and cannot apply where that word is connected with 'dower,' which

(a) 3 Ves. 337.

(b) 6 Ves. 385, 388.

(c) Id. 390.

would apply to both events, whether there were children or not " (a).

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In *Walker v. Walker* (b), the husband, by deed before marriage, covenanted to settle on the intended wife, if she survived him, part of his real estate, "for her jointure, and in full, bar, and recompense of all dower or thirds which she could be entitled to, or any way claim, out of any lands of which he then was or ever after during the coverture should be seised, of freehold or inheritance." The husband having afterwards purchased copyhold estates, upon his death his widow entered into possession of the whole of such copyhold as her freebench. Lord *Hardwicke* held that she was barred from claiming them, observing, "This is said not to be 'dower;' and it certainly is not 'thirds,' being a claim of the whole: but it is something analogous to dower; therefore, though not strictly within the words, it will be proper to give it a liberal construction."

Upon the whole, therefore, the conclusion at which I arrive from the authorities is, that the word "thirds" is a general expression which may signify, according to the intent and scope of the instrument, the interest of a widow in any property, whether personal or real, of her deceased husband in case of his intestacy.

It was argued, indeed, that where, as here, the expression is in the alternative "in lieu of dower or thirds," the terms must be taken as synonymous, and the word "thirds" as explanatory of "dower;" but I observe the same alternative form of expression in *Druce v. Denison* (c), and *Gurly v. Gurly* (d); and it seems to me that it is not an incorrect form to adopt, in order to denote two things which are distinct from each other—the meaning being

(a) 6 Ves. 394.

(b) 1 Ves. Sen. 54.

(c) 6 Ves. 385.

(d) 8 Cl. & Fin. 743.

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"if the widow claims out of real estate, she is to be barred of her dower; if out of personal estate, she is to be barred of her thirds."

Such being the result of the authorities, it remains to consider what is the scope of the particular instrument in the case before me.

By the settlement before me, the lady, it is true, makes over the whole of her property, with the exception of a few specified articles, to her intended husband absolutely. But upon his death she or her appointees are to receive a large sum (£2,000) out and out: and that sum is to be payable out of her husband's personal estate as the primary fund. She is also entitled upon her husband's death, in the event of her surviving him, to an annuity of £240 : 11 : 6 during her life: and even that annuity, although primarily charged upon the rents of the land which he conveys to the trustees of the settlement, yet, as to so much of it as those rents may be insufficient to pay, is charged upon the income to arise from the proceeds of the shares in the *Rock Assurance Company*.

In considering what effect is to be given to the stipulation that the provision made by such an instrument is "in lieu of dower or thirds," I am to look, according to the authority of Vice-Chancellor *Shadwell* in *Colleton v. Garth* (a), to the fund out of which the provision is made. There it was out of land, it was called "a rent-charge," and given "for the wife's jointure." The Vice-Chancellor, therefore, held that the word "thirds" referred exclusively to the husband's real estate. Here the provision is out of a mixed fund, consisting of personalty as well as realty; and by parity of reasoning I feel bound to hold, looking to the general meaning which according to the authorities is given to the word "thirds," that the provision in question was intended

to be in lieu of all interest which the wife might take in the property of her intended husband, whether real or personal.

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 Judgment.

It is not altogether unimportant that the intended husband was a widower with children. It is one of the circumstances under which the deed was executed, and increases the probability that the stipulation was intended for the benefit of those children in the event, which has happened, of his dying intestate.

I feel the less regret in coming to this conclusion upon the first question, because, if I had come to a contrary conclusion, and held the Plaintiff entitled to a distributive share, I should have felt no doubt upon the second question that the £2,000 provided by the settlement must be taken by the Plaintiff in part satisfaction of her distributive share.

DECLARE, that the provision made for the Plaintiff by the indenture of settlement of the 31st of July, 1860, is in lieu of her dower out of the real estate, and of her distributive share in the personal estate, of her late husband, *Edward Thompson*, deceased.

*Minute of
 Decree.*

1863.

January 23rd.
Joint-Stock
Company—In-
valid Debentures
— Assignee —
Estoppel.

Debentures were issued by a company, in payment for work, to *S.*, who was styled an honorary director, and had acted on the board, but whose name was not inserted in the registered list of directors. *S.* assigned to *H.*, who had no notice that *S.* had acted in any way as director. *H.* recovered judgment in *S.*'s name in an action against the company for interest on the debentures, the dealings with *S.* having been disclosed to the shareholders by a previous report. *S.* having become bankrupt, and the company being in course of winding-up—*Held*, that *H.* was entitled to prove on the debentures.

RE SOUTH ESSEX GAS LIGHT AND COKE COMPANY.

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HULETT'S CASE.

THE *South Essex Gaslight and Coke Company* was registered under the Joint-Stock Companies Act 1856, and was ordered to be wound-up on the 12th January, 1858.

This case came on upon an adjourned summons to determine the validity of a claim made by *David Hulett* to rank as a creditor of the company in respect of two debentures of the company for £400, which had been issued to *William Morley Stears*, and assigned by him to *Hulett*; and also upon a judgment recovered by *Hulett* in the name of *Stears* for interest on the same.

It appeared that *Stears* had entered into a contract with the company to erect gas works for them for the price of £9,500, and had become indebted to *Hulett* for materials supplied for the purposes of the contract. The debentures on which *Hulett* claimed were both dated the 3rd of January, 1854; and by each of them, in consideration of £200, recited to have been paid by *Stears*, the property of the company was charged with the payment, on the 4th of January, 1859, of £200 to *Stears*, his executors, administrators, and assigns; and coupons for interest at £5 per cent. were attached. These debentures were transferred by *Stears* to *Hulett* by an indenture of the 29th of August, 1854, in part payment of *Stears*' debt, one having been previously handed over to him on the 13th of May, 1854. After the winding-up, *Stears* had applied to be admitted as a creditor for the unpaid balance claimed by him under his contract; and the Court refused the motion on the ground that *Stears* was acting as a director when his contract was entered into, but gave liberty to *Stears* to bring such action as he might be advised. This case is reported in Johns. 480.

Stears afterwards brought his action against the official

manager, and declared upon the contract, with counts upon debentures which had been issued to him, and for work and labour done. The company pleaded that *Stears* was a director ; and also put in a plea, as to part, of payment by the issue of debentures, to which last plea *Stears* replied that the debentures were void at law ; and, upon demurrer, judgment was given for the Defendants. This case is reported 30 L. J., C. P., 49.

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RE SOUTH
ESSEX GAS-
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HULETT'S CASE
Statement.

Stears had subsequently become bankrupt.

By the evidence on the present application, it appeared that *Hulett* was informed by *Stears*, when he took the debentures, that they had been issued to *Stears* in part payment under his contract, but that *Hulett* had no notice that *Stears* had been acting as a director ; that, in the return of the list of directors registered by the company, the name of *Stears* was not included ; and that he had never held a share in the company.

It also appeared that the first interest fell due on one of the debentures on the 3rd of July, 1854, and was not paid ; but *Hulett*, at the request of the secretary of the company, forbore to press for immediate payment. In January, 1855, further interest became due on both debentures, and was not paid. In June, 1855, *Hulett* took out a summons in the Sheriff's Court in *Stears*' name, for £15, the interest then due ; but on receiving from the secretary a letter to the effect that arrangements were expected to be made which would be satisfactory to the creditors, and requesting that the proceedings might be stayed, he consented to let them drop. In July, 1857, *Hulett* brought an action for three years' arrears of interest, which after some months went to judgment and execution, and payment was obtained. In the course of these proceedings, the secretary of the company applied to *Hulett* to renew his debentures at £6 per cent., but this was refused.

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 COMPANY.
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In July, 1857, the directors issued a report, in which loans on mortgage and debentures, to the amount of £2,900, were stated among the liabilities of the company; and a further sum of £1,075 was entered as a claim by *Stears*, not acknowledged as a debt. On the other side, the gas works were entered as assets to the value of £7,533 9s., taken at their cost price. This report was adopted by a general meeting.

The company had power, by its deed of settlement, to raise £5,000 on mortgage, if sanctioned by resolutions of two extraordinary general meetings, attended by at least twenty-five shareholders holding not less than 300 shares. At the second of the two meetings, at which the issue of the debentures in question was authorised, the requisite number of shareholders did not attend.

The deed also provided that the reports of the directors, when approved by a general meeting, and signed by the chairman in testimony of such approval, should be binding and conclusive on all the shareholders, and all persons claiming under them, unless some manifest error should be discovered, when the same should be forthwith rectified by the directors, and the report so rectified should be binding and conclusive.

Argument.

Mr. James, Q.C., and Mr. Roxburgh, for *Hulett* :—

The debentures, on the face of them, are intended to be assignable, though not at law negotiable instruments; nor is there anything on the face of them to show that they were not originally given for an advance of money. We took them bona fide for value, without any notice that *Stears* had acted as a director, or that there was any defect in his title to the debentures. We had, in fact, a right to assume that *Stears* was not a director, for he was not a shareholder, and his name was not included in the return of the list of directors. Moreover, the company have had

the benefit of the outlay for which these debentures were given, the gas works being included in their assets. On these grounds alone we are entitled to recover on the debentures: *Re Athenæum Society, Ex parte Eagle Company* (a); *Athenæum Society v. Pooley* (b); *Re Magdalena Company* (c); *Stears' case* (d). Then it is objected to the validity of these debentures, that their issue was not sanctioned by the requisite majority; but we had no means of knowing that: and on the authorities already cited it is enough that we are bona fide holders of debentures under the common seal, purporting on the face of them to be regularly issued.

But even if there had been any defect in our title the subsequent dealings of the company would have cured it. We sued in *Stears'* name for interest, the company applied for time, which was granted, and ultimately the company submitted to a judgment which estops them from disputing our title. Any representation by the company that debentures are valid is sufficient to sustain the claim of a bona fide holder, to whom the representations are made. In an unreported case of *Woodham v. Anglo Australian Mining Company*, heard in December, 1861, before Vice-Chancellor *Stuart*, the assignee of debentures irregularly issued to a director was allowed to recover, on the ground that the secretary to the company had told him the debenture was "all right." Further than this, the validity of our debentures was recognised by a general meeting.

Mr. *Shelbeare* (Sir *Hugh Cairns*, Q. C., with him), for the official manager:—

The debentures were clearly invalid in *Stears'* hands, as appears from the judgment of this Court in *Stears' case*; and further, from a subsequent action brought by *Stears*, which contained a count upon the debentures, and in which *Stears* was defeated: *Stears v. South Essex*

(a) 4 K. & J. 549.

(b) 3 D. G. & J. 294.

(c) Johns. 690.

(d) Johns. 480.

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RE SOUTH
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Argument.

Company (a). Moreover, the debentures were bad, first, because not properly sanctioned; and also, because they were given for work done, and not for money advanced by way of loan, which was the only purpose for which the deed authorised the issue of debentures.

This being so, *Hulett* can be in no better position than *Stears*; for it is clear that the balance-sheet said to have been adopted by a general meeting gave no information as to the particular debentures there referred to; and there was no representation made by the company to *Hulett* at all like that which was the foundation of Vice-Chancellor *Stuart's* decision in *Woodham's case*. This is not a mere question of ultra vires; but the issue of the debentures to *Stears* was in the nature of a fraud; and the bona fides of the assignee does not give validity to such an instrument: *Athenæum Society v. Pooley (b)*.

Then the judgment at law is no estoppel here, at any rate in a case of fraud.

Mr. *James*, in reply.—It is quite clear that the debentures set down in the balance sheet could have been no other than those given in payment for *Stears'* contract, this having been the only expenditure of the company. The shareholders, therefore, confirmed their validity with full knowledge, the minute books being open to them. Further, we rely on the estoppel of the judgment at law.

Judgment.
 ———

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I am of opinion that this claim must be allowed. *Hulett* took the debentures which had been issued to

(a) 30 L. J., C. P. 49. (b) Judgment of L. J. Turner, 3 D. G. & J. 301.

Stears, not knowing that *Stears* had acted as a director, and having a right, from the absence of *Stears'* name in the returns made by the company under the Act of Parliament, to conclude that *Stears* was not a director. So far, therefore, as the question of notice is material, I must hold that there is nothing to affect *Hulett* with any notice beyond the knowledge, which he admits, that the debentures had been given for work done by *Stears*. As to the legality of issuing debentures in payment for work, the power in the deed being to raise money on mortgage or debentures, I think I must treat it as substantially the same thing to pay the contractor in debentures, as to issue the debentures to him for money, and then to hand the money back to him in payment for work, which would be strictly within the words of the power. *Stears*, however, having acted as a director, the payment to him in either form would be equally bad. In *Teversham v. The Cameron's Coalbrook Company* (a), it was held that a loan by a director to the company was a contract within the mischief of the 29th section of the Joint Stock Companies Act; but in the case of *Woodham v. Anglo Australian Mining Company*, I find that Vice-Chancellor *Stuart* held that an assignee of a debenture so issued could claim, he having been assured by the secretary that the debenture was all right. I am glad to be fortified by this authority in the view which I take, for *Woodham's* case was clearly stronger than the present, because *Hulett* has actually sued in the name of *Stears*, and recovered interest on the debentures. This is a transaction which did not rest in the breast of the directors, but must be treated as a matter within the knowledge of the company itself. Instead of disputing the claim, the company, in the first instance, applied for and obtained some delay in *Hulett's* action, and ultimately allowed judgment to pass. We find, therefore, *Hulett* suing on the

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(a) 3 De G. & Sm. 296.

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very instruments under which he now claims, and no objection to their validity raised at the time, or at any time until after the winding-up order. Then, what was the state of circumstances within the knowledge of the company? The balance sheet of July, 1857, which has been put in evidence, states the total liabilities of the company, including £2,900 for loans on mortgage and debentures, and a further claim by *Stears* (not admitted as a debt), of upwards of £1,000. On the other side, the value of the gas works (taken at cost) is entered as £7,500. It is clear on the face of the account, that the contractor must have been in part satisfied by means of these debentures, and this was known to the shareholders several months before the judgment. This was at least sufficient to put them on inquiry, stimulated as they would be by the name of *Stears* himself appearing as the formal Plaintiff. With ordinary diligence they might have ascertained all the circumstances of the issue of these debentures; and yet what they do is to submit to judgment and execution. The case of the present claimant is moreover strengthened by the fact that *Stears*, against whom he could have recovered, has since become bankrupt, *Hulett* having been encouraged in not proceeding against *Stears*, at a time when he might perhaps have obtained payment in full from him, by finding that the company did not attempt, when sued in *Stears'* name, to deny the validity of the debentures.

I do not wish to make a precedent for any such position as that the assignee of a chose in action is, in general, in a better position than his assignor; still this case is, in many particulars, essentially different from *Pooley's case*, and other authorities of the like character. Under the Joint Stock Companies Act, a contract by a company with a director is declared to have no force until approved by a general meeting; and therefore the transaction with *Stears* may, in some sense, be called fraudulent. Nevertheless, the works

were executed ; the company had the benefit of them, and there was no actual fraud in the same sense as in *Pooley's case*.

The whole case is this:—Debentures originally invalid, because *Stears* could not take them, either in payment for works, or as security for a loan—then the circumstances sufficiently disclosed to affect the company itself with knowledge of the transaction, and with that knowledge judgment subsequently allowed to pass against the company in an action brought by the assignee in the original holder's name upon these very debentures for the interest then due. After this it is not open to the company to dispute the validity of the claim.

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46h 339
819 329

MANSELL v. FEENEY.

THE Plaintiff alleged, that, by an agreement made in April, 1844, and an option exercised thereunder by Plaintiff, in March, 1847, Plaintiff became a partner with the Defendant in a newspaper business, and prayed that proper articles should be settled and for an account of profits. The bill did not contain a charge of books and papers, but there was an interrogatory as to documents.

The Defendant's case was, that the Plaintiff had merely advanced money on loan, and he put in a plea

1861.
April 18th, 19th.
Pleading—Ne-
gative Plea—
Answer—Do-
cuments — 37th
Order of Aug.
1841.

To a bill for accounts of an alleged partnership between Plaintiff and Defendant, the Defendant put in a plea of no partnership, accompanied by an answer in which the defences of laches

and the Statute of Limitations were taken:—*Held*, that, notwithstanding the 37th Order of Aug. 1841, the plea and answer was bad for duplicity, that Order being intended to prevent failure of justice from accidental slips not to justify two distinct defences by plea and answer. The answer also admitted certain specific documents, which tended to prove the case of partnership, and further admitted the possession of documents mentioned in a schedule to an affidavit referred to (which documents the Defendant declined to produce), and, save as appeared by the said schedule, denied the possession of any relevant documents. The bill contained no charge of books and papers, but there was an interrogatory on the subject:—*Held*, that the answer did not give the discovery required to support a negative plea, and the plea ordered to stand for an answer.

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 v.
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 —
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denying that there was any partnership, together with an answer in which he also took the defences of laches and the Statute of Limitations. The Defendant by the answer also stated, that he had made an affidavit setting forth a schedule, of documents relating to the matter in the bill mentioned and save as appeared thereby he had no documents relating to the matters in question in the suit.

This affidavit filed on the 17th of December, 1860, admitted the possession of relevant documents set forth in the 1st and 2nd parts of the schedule thereunto annexed, and proceeded as follows:—"I further say, that I object to produce the documents in the 2nd part of the said schedule contained, inasmuch as the same relate only to the purchase, by the Defendant, of the said newspaper, and to the profit and loss in carrying on the same. And I further say, that I am not and never was a partner with the Plaintiff in the purchase of the said newspaper, or in the business of carrying on the same; and that the Plaintiff has not, and never had, any interest whatever in the documents in the said 2nd part of the said schedule:" and further denied the possession of any relevant documents other than the documents in the 1st and 2nd parts of the said schedule.

The answer also admitted a correspondence set out in the bill, in which the Plaintiff had spoken of the business as a joint concern, without eliciting from the Defendant any immediate denial of the existence of a partnership, though at a subsequent stage of the correspondence the partnership was distinctly denied.

Argument.

Mr. *Rolt*, Q.C., and Mr. *Speed*, for the plea.—We deny the partnership; and this is a sufficient bar to all discovery as to the profits and losses of the business, and to the prayer for partnership accounts. As to any supposed liability in respect of the advances of the Plaintiff we have answered.

Sir *H. Cairns*, Q. C., and Mr. *W. P. Murray*, for the Plaintiff:—

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The plea is bad both in substance and form. In all cases of a negative plea of no partnership or the like, there must be an answer giving full discovery as to all facts tending to rebut the plea: *Jones v. Davis* (a), *Evans v. Harris* (b), *Harris v. Harris* (c), *Denys v. Locock* (d), *Attorney-General v. Corporation of London* (e).

The plea is also bad for duplicity: *Emmott v. Mitchell* (f), *Cooth v. Jackson* (g), *Beames on Pleas* (h).

This plea is, therefore, bad in substance for not giving the proper discovery, and in form for duplicity, and also because a Defendant answering must answer fully. Some reliance may be placed on the absence of the charge of books and papers; but it is decided that that is not necessary under the new practice, as a foundation for an interrogatory on the subject. The Defendant was, therefore, as much bound to answer this interrogatory as he could have been, under the old practice, to answer that part of the bill which contained the charge of books and papers; and it cannot be pretended that a full answer has been given: *Perry v. Turpin* (i).

Mr. *Speed* in reply:—

The real issue is partnership or no partnership, and it is admitted that this may be tried upon the plea.

We say that we have answered fully all the charges in the bill; and however the new practice may have dispensed with the necessity of this charge for ordinary purposes, it

(a) 16 Ves. 262.

(b) 2 V. & B. 361.

(c) 3 Hare, 450.

(d) 3 My. & Cr. 205.

(i) Kay, App. 49.

(e) 2 M. & G. 247.

(f) 9 Jur. 171

(g) 6 Ves. 12.

(h) Page 39.

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has not extended the old rule as to answering, which was merely that a Defendant answering must answer fully all the charges in the bill: *Daniel's Practice* (a), *Sanders v. King* (b), *Thring v. Edgar* (c). In the case of a plea and answer it is not necessary to answer anything except what is expressly charged in the bill as evidence of the fact put in issue by the plea.

The 37th Order of August, 1841 (d), removes the difficulty that formerly arose from the rule, that a plea might be overruled by answering too much or too little.

We have fully answered the bill, and it is not necessary, for the purpose of sustaining the plea, to answer the interrogatories where they go beyond the charges of the bill. As to the objection for duplicity, I admit that the answer raises the defence of delay and acquiescence, which would have overruled the plea before the Order of August, 1841; but it is not so now, and the only question as to duplicity is, whether the plea tenders a single issue, and this our plea does—the issue of partnership or no partnership. In *Emmett v. Mitchell*, there was the same kind of duplicity, the defences being the Statute of Limitations, and non-liability on the original facts; but this objection did not prevail.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question in substance is, whether the Defendant is bound to produce the accounts and books required by the bill. The plea is put in for the purpose of avoiding the production of the alleged partnership accounts. It would, no doubt, be a great hardship for the Defendant to be compelled to put

(a) 2nd Ed. 374.

(b) 6 Madd. 61.

(c) 2 Sim. & St. 274.

(d) Consolidated Orders, xiv. 9.

in accounts which had no tendency to prove the issues raised in the suit. In cases of this kind I have always endeavoured to draw a line between accounts which are necessary for the decision of questions which may occur at the hearing, and those which could in no event be required until the decree came to be worked out, and could have no bearing on the issue in the cause.

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Lord *Cottenham* laid it down that a Plaintiff filing a bill alleging himself to be a creditor of a testator, has no interest in seeing the testator's title deeds before the hearing; and that the Court will struggle to prevent any needless exposure of the Defendant's affairs. But this plea is very inconvenient in point of form, even if it were saved in this respect—as I do not think it is—by the Order which directs “that no demurrer or plea shall be held bad and overruled on argument, only because the answer of the Defendant extends to some part of the same matter as is covered by such demurrer or plea.” That Order was intended to prevent the failure of justice from accidental slips which constantly happened by reason of some slight part of the same ground being covered both by a plea and answer; but it was not designed to enable a Defendant to take by a plea and answer two substantially distinct defences. This plea goes to the whole bill, and it is accompanied by an answer, which sets up two defences, each of which is also an answer to the whole bill. There are, therefore, three defences to the whole record—one taken by the plea, and two by the answer.

It is urged, that, if issue is taken on the plea, the case will be decided, and the Plaintiff, if successful, will establish his right to the discovery he may require. Still, I think this is not a case where the Court should favour the setting up of three defences by a plea and answer. The plea would clearly have been bad under the practice before 1841; and

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I do not think it is within either the words or the spirit of the Order relied on.

Independently of the defect in form, there is a substantial objection to the plea, the validity of which, however, depends upon the new practice of the Court. Under the old practice, a bill always contained a charge of the possession of books and papers, from which the truth of the allegations of the bill would appear, or, as it was sometimes put, relating to the matters contained in the bill. If there had been such a charge in the bill in this case, it would have been necessary, according to *Harris v. Harris*, for the plea and answer to negative the charge. The answer in that case did affect to negative the charge, so far that it admitted the possession of books and papers relating to the said business, which the Defendant submitted he was not bound to produce; and excepting these, he said he had not any documents by which the truth of the alleged matters would appear—and on this Vice-Chancellor *Wigram* observed, that the Defendant did not deny that the truth would appear upon the documents in his possession, and therefore, for the purpose of the argument, admitted it. On that ground the plea was overruled.

In the present case the bill does not contain the charge of books and papers, it being the settled practice of the Court, since the Act of Parliament which requires the bill to contain only statements of fact, to regard charges of the evidence relied on as unnecessary, except when they are required to point to particular evidence, as in the case of admissions and the like. Upon the statement of facts contained in the bill, interrogatories are exhibited, and the Court has not been very precise in limiting the extent of them; and I have myself held that the charge of books and papers is not necessary to give a right to interrogate as to the point, the Act pointing out that it was desirable to omit from the bill all extrinsic matters not constituting facts in the cause.

This course was followed by the Plaintiff in this case. Interrogatories were filed asking for books and papers relating to the subject matter of the suit. The whole matter in dispute was the alleged partnership; and the answer of the Defendant is only this, that he has made an affidavit to the effect, that, except certain documents therein mentioned, he has no documents relating to the matters in question. That refers me to the affidavit as part of the answer, and I am bound to look at it, and there I find that the Defendant admits the possession of a quantity of books and papers which he declines to produce, and the answer is therefore in effect that he has relevant documents which he refuses to produce. The form used here is not "whereby the truth will appear," but the case is otherwise as near to *Harris v. Harris* as can be conceived; and what strikes me especially is, that the Defendant confesses some particular documents which go far to support the alleged partnership. A correspondence is mentioned in the Plaintiff's bill, and this is admitted; and I find that it contains one letter in which the Plaintiff makes a clear assertion that the newspaper was a joint concern, the reply to which does not deny that this was the case. The Plaintiff says that a certain course will damage "the joint concern;" to which the answer is not a denial of the joint interest, but that it was a question of convenience. Subsequently, it is true, the dispute arose, and the partnership was denied.

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What I have before me, therefore, is a plea and answer to the relief, and also to the discovery sought, which, in terms, denies the partnership, and which admits the possession of other relevant documents, than those mentioned in the bill, but declines to produce them. Under these circumstances, I apprehend the Defendant cannot escape discovery of these documents, which are treated in the interrogatories as having an important bearing on the question in issue, and are admitted by the answer to relate thereto.

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The Defendant says, he pleads "no partnership" in bar to the whole relief and discovery, and I am asked to hold, that, by the answer he has given, he has satisfied the rule of supporting by answer the negative defence raised by the plea, he having admitted documents which he does not deny to be relevant, and having further set out particular documents which afford strong evidence in favour of the Plaintiff's contention.

Further than that, the answer sets up two additional defences—laches and the Statute of Limitations—which may possibly be good, but ought not to be combined with this plea.

This appears to me to be simply an attempt to evade the very discovery which is the most likely thing possible to lead to the proof of the partnership which the Plaintiff seeks to establish and which the plea denies. The plea must stand for an answer, the Defendant paying the costs, and the Plaintiff having a week to except.

10 Q.B.D. 196
 17 — 1863
 May 2nd, 3rd.
 Production—
 Partnership—
 Accounts.

The Court accepts the oath of a Defendant whether documents are relevant; but the Plaintiff has a right to judge for himself whether they

will assist his case, and is entitled to the production of all relevant documents, except such as the Court can clearly see to have no bearing on the issue.

Where a Defendant by affidavit admitted documents to relate to the matters in question in the suit, but denied that they tended to prove the Plaintiff's case (an alleged partnership), or that the Plaintiff's name appeared in them—Production ordered, with liberty to seal up money items in the accounts.

1863
 13 Feb 605 MANSELL v. FEENEY (2).

THIS was an adjourned summons for production of documents. *4 Feb 907 P. 339*

The facts and pleadings are stated ante (p. 313) in the report of the case upon the plea.

On the 25th of April, after the judgment overruling the

plea, the Defendant filed a further affidavit, stating that none of the documents in the second part of the schedule to the former affidavit in any way related to the alleged agreement for a partnership, or to any agreement between Defendant and Plaintiff, or shewed or tended to shew that the alleged or any agreement was ever made between Defendant and Plaintiff, or that the newspaper was purchased or carried on, or so agreed to be, on the joint account of Defendant and Plaintiff, or that Plaintiff then or ever had any right to be a partner or to share in the profits; that the name of the Plaintiff was not mentioned in the said documents, except as an ordinary customer, and except at certain specified pages, which particulars Defendant was willing to produce, but claimed to seal up the remainder of the account-books, and objected to produce the other documents; and denied, that, by the sealed-up portions of the book or by the other documents if produced, the truth of any of the matters contained in the said bill would thereby appear.

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Sir *H. Cairns*, Q. C., and Mr. *W. P. Murray*, for the motion :—

Argument.

We are not bound to accept the Defendant's statement that the documents will not assist us in proving the partnership. This is an inference of law, of which we are entitled to judge for ourselves, and for that purpose to see the documents.

[They cited *Smith v. Duke of Beaufort* (a), *Swinborne v. Nelson* (b), *Clegg v. Edmondson* (c), *Great Luxembourg Railway Company v. Magnay* (d), *Reade v. Woodroffe* (e), *Gresley v. Mousley* (f).

(a) 1 Hare, 507.

(b) 16 Beav. 416.

(c) 22 Id. 125.

(d) 23 Id. 646.

(e) 24 Id. 421.

(f) 2 K. & J. 288.

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 —
Argument.

Mr. *Rolt*, Q.C., and Mr. *Speed*, for the Defendant:—
 We have denied the relevance of all the documents except those parts which we offer to produce. It would be contrary to the practice of the Court, and most oppressive, to compel us to disclose the particulars of the profit and loss of the business until the Plaintiff has established the alleged partnership: *De La Rue v. Dickinson* (a), *Jacobs v. Goodman* (b), *Donegal v. Stewart* (c), *Attorney-General v. Thompson* (d), *Stainton v. Chadwick* (e), *Adams v. Fisher* (f), *Wigram on Discovery* (g).

In *Clegg v. Edmondson*, on the appeal (h), the Lords Justices ordered the motion to stand over to the hearing; and that would meet the justice of this case.

Sir *H. Cairns*, in reply.—Where documents are immaterial to the issue, and material only for inquiries, which may take place subsequent to the hearing, I admit that there is no right to production. That was the case with the accounts, the production of which was in dispute in *De La Rue v. Dickinson*. But if the documents are material to the issue, they must be produced. The very fact, that the Defendant raises additional defences of laches and the Statute of Limitations, shows that we have a *prima facie* case, and the documents are *prima facie* relevant. By the answer, the relevance was admitted; and it is not open to the Defendant, after his plea has been overruled, to escape production by filing an affidavit, alleging that the documents would not tend to prove the Plaintiff's case. In *Smith v. Duke of Beaufort*, and other cases, it has been settled, that the suggestion in the answer, that the relevant documents will not prove the Plaintiff's case, is not alone an answer to a motion for their production.

(a) 3 K. & J. 388.

(b) 3 B. C. C. 487, n.; 2 Cox, 282.

(c) 3 Ves. 446.

(d) 8 Hare, 106, 115.

(e) 3 Mc N. & G. 343.

(f) 3 My. & Cr. 526.

(g) Pages 221, 312.

(h) 3 Jur., N.S., 300.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

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Judgment.

The practice of the Court as to production is well settled, and is quite consonant with reason and justice. Even where the question arises on the answer, the Court has refused to compel a Defendant to set out accounts of profits, where the alleged partnership is denied, because a mere account of profits cannot affect the question whether he is a partner or not. The Plaintiff is entitled to all such discovery, and to the production of all such documents as are necessary to make out his case at the hearing; and if he should fail in that, any account of the profits of the business would become useless and improper; and it would be unjust to the Defendant to compel him to disclose such particulars to a person, who, in the event supposed, would have had no interest in the discovery.

Even upon the answer, therefore, a Defendant cannot be called upon to set out what has no possible bearing on the issue to be tried at the hearing. The same observation applies still more strongly to the production of documents, because the technical rule—that a Defendant who answers at all, must answer fully, does not touch that case. The real question is, how far the documents in dispute would assist the Plaintiff in making out his title at the hearing. It is clear that all documents which manifestly can have no bearing on the issue are protected. On the other hand, the rule is, that a Defendant cannot protect himself from production by swearing that the contents of relevant documents are not such as to assist the Plaintiff's case. He is bound to put his affidavit in the common form of setting out all the documents which relate to the matters in question in the suit. Here he has admitted that these documents are relevant. From this it would follow, of course, that they should be produced, notwithstanding an allegation that they will not prove the Plaintiff's case. The Court

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—
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accepts the Defendant's statement on oath as to what documents are relevant ; but when this is once admitted, the Court does not accept the Defendant's assertion on the point, whether they will or will not establish the Plaintiff's case. Such a statement would be one on which it would be very difficult to obtain a conviction for perjury, however false it might really be. That question, therefore, is considered to be one on which the Plaintiff has a right to the opportunity of judging for himself. The production, therefore, cannot be refused ; but I can do here, as I have done in other cases, viz., give liberty to seal up portions which cannot possibly bear upon the issue. I intend to protect the Defendant against any production which is sought merely from curiosity ; but, subject to that, I think the case for production is very strong. There is on the face of the pleadings a *prima facie* case of a joint interest apparent. There is in the affidavit an assertion that the name of the Plaintiff does not appear in the documents of which production is resisted, and the contention generally is, that the interest of the Plaintiff was merely that of a lender. That, however, is very different from the case which Lord *Eldon* puts of discovery sought by a person who is a mere stranger ; and the utmost I can do now to protect the Defendant from needless disclosure will be to order production, with liberty to seal up the money items in the accounts. If anything special arises upon the face of the documents, that may be the subject of an application in chambers ; the principle on which I shall proceed being, that all particulars ought to be protected from disclosure, which I can clearly see to have no bearing on the issue.

789/45-
LR 289 20
-19-58.

211-12 62

JERDEIN v. BRIGHT.

Dec. 8th, 1860;
Jan. 16th, 1861.

THIS case came on upon demurrer. The suit was instituted to obtain the execution of the trusts of a creditors' deed, in which one *Robert Todd* was the debtor, and *Alfred Gray* one of the executing creditors.

The bill stated the Plaintiff's title in these words:—

"The Plaintiff, as the assignee of the debt of one *Alfred Gray*, one of the creditors of *Robert Todd*, deceased, who executed an indenture of the 23rd of March, 1846, seeks by this suit to have the trust of such indenture carried into execution."

Mr. *Amphlett*, Q.C., and Mr. *Southgate*, for the demurrer, objected that there was no sufficient allegation of the Plaintiff's title.

Mr. *Rolt*, Q.C., and Mr. *Welford*, for the bill, argued that, according to the new practice of the Court, it was not necessary or proper to set out title at length.

The VICE-CHANCELLOR allowed the demurrer on this point, with liberty to amend.

The bill was subsequently amended, and, after a second demurrer, re-amended, by making the said *Alfred Gray* a Defendant, and alleging that the Plaintiff was the assignee of the debt of *Alfred Gray*, and that the Defendant *Alfred Gray* admitted that the Plaintiff was such assignee; that he (*Gray*) had no interest in the debt,

refuses to take proceedings against the purchaser, but the bill did not state by whom he was asked to do so:—*Held*, also, on demurrer by the purchaser, that this was not sufficient to entitle the Plaintiff to sue. Semble, that a refusal by the trustee to sue on the application of a cestui que trust would have sufficed to sustain the bill on this point.

Held, also, that the bill was multifarious for joining a prayer for accounts with that for relief against the purchaser.

The 9th section of the Statute of Frauds refers to assignments by the cestui que trust.

Demurrer—Pleading—Averment of Title—Suit by cestui que Trust on Refusal of Trustee to sue—Multifariousness—Statute of Frauds, 29 Car. 2, c. 3.

Plaintiff filed a bill for the administration of the trusts of a creditors' deed, and for relief against a purchase (alleged to be fraudulent) by one of the Defendants from the trustee.

The Plaintiff alleged that he was the assignee of the debt of a Defendant who had executed the deed as a creditor, and who admitted the Plaintiff's title—*Held*, on a demurrer by the purchaser, that this was an insufficient averment of title.

No collusion in the purchaser's fraud was alleged against the trustee, but it was averred, that, after he discovered the fraud, he refused and still

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 Statement.

and that it was duly vested in the Plaintiff, but that the Defendant *Alfred Gray* refused to join as a co-plaintiff.

The bill stated the execution of the creditors' deed of the 23rd of March, 1846, by *Todd* the debtor, the Defendants *T. Gould* and *R. Thomas* (both since deceased), and the Defendant *J. Bright*, the trustees, by *Gray* for a debt of £50, and by other creditors.

It also stated, that, in the year 1858, *Bright*, with the privity of *Thomas*, employed the said *R. Todd*, or permitted him to act, as agent for the sale of part of the trust property, consisting of an interest in certain mines, and adopted a sale negotiated by *Todd* for £4075, to the Defendant *Timothy Bennett*. That the Defendant *Bennett*, knowing that *Todd* was the agent of the trustees, agreed to give to *Todd* certain annuities in addition to the sum of £4075, as the consideration for the purchase, in order that *Todd* might unfairly induce the trustees to complete the purchase for the price of £4075; and that *Bennett*, acting in collusion with *Todd*, concealed this circumstance from the trustees.

The bill further stated, that the sale was completed by *Bright* (then the sole surviving trustee) by a conveyance of the 22nd of October, 1858, for the price of £4075; that, in April 1860, *Bright* discovered the fraud of *Bennett*, "but omitted and refused, and still refuses, to take any proceedings against the Defendant *T. Bennett*, to compel him to make good to the said trust funds the loss occasioned thereto by his said fraud, or to set aside the indenture of the 22nd of October, 1858;" and that the Defendant *Bennett* was liable to make good to the said trust a large sum of money by reason of his said fraud, which would be wholly lost unless the Plaintiff, as a person beneficially interested in the said trust funds, should be enabled to compel the Defendant *Bennett* by this suit to make good the same.

The bill prayed for execution of the trusts of the creditors' deed; that *Bennett* might pay to *Bright*, as trustee of the deed, the value of the annuities given to *Todd*; or otherwise that the conveyance to him should, at Plaintiff's option, be set aside; and for an account of mesne profits.

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v.
BRIGHT.
Argument.

To this re-amended bill a demurrer was filed by *Bennett* for want of equity and multifariousness.

Mr. *Amphlett*, Q.C., and Mr. *Southgate*, for the demurrer:—

1. The allegation of the Plaintiff's title is insufficient. It states that he is an assignee, and that *Gray* admits him to be so; but it ought to state how the debt was assigned to him, especially having regard to the 9th section of the Statute of Frauds, which requires such an assignment to be in writing: *Lord Digby v. Meech* (a), *Baker v. Harwood* (b), *Walburn v. Ingilby* (c), *Barkworth v. Young* (d).

2. The allegations are not sufficient to entitle the Plaintiff suing his trustee to join a Defendant who is alleged to be indebted to the trust estate. All that is alleged is, that the trustee discovered the fraud and refused to sue, and he may have had very good grounds for refusing to sue. It is not alleged that *Bright* was a party to the fraud; and *Bennett*, therefore, cannot be made a Defendant. For this purpose collusion or insolvency must be alleged, or, at any rate, special circumstances rendering such a form of suit necessary: *Travis v. Milne* (e), *Troughton v. Binkes* (f), *Alsager v. Rowley* (g), *Barker v. Birch* (h), *Stainton v. The Carron Company* (i), *Burrows v. Gore* (j).

- (a) Bunb. 195.
- (b) 7 Sim. 373.
- (c) 1 M. & K. 61.
- (d) 4 Drew. 1.
- (e) 9 Hare, 141.

- (f) 6 Ves. 573.
- (g) Id. 748.
- (h) 1 De G. & Sm. 376.
- (i) 18 Beav. 146.
- (j) 6 H. L. Cas. 925.

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The bill is moreover multifarious: *Pearse v. Hewitt* (a), *Lancaster v. Evors* (b), *Salvidge v. Hyde* (c), S. C. on Appeal (d).

Further, the Plaintiff, being one only of a class of persons interested, asks for an option of rescinding the sale, which he clearly cannot exercise.

Mr. *Rolt*, Q.C., and Mr. *Welford*, for the bill.—Upon our allegations the Defendant *Bennett* is a trustee, he having acquired part of the trust property by a fraud. He is therefore properly made a party to a suit for the administration of the trusts, which cannot be administered without getting in the trust funds. It is not necessary that every Defendant should be interested in every part of the bill; and the question of multifariousness is one of discretion and convenience: *Campbell v. Mackay* (e). Even before the rule as to multifariousness had been thus relaxed, all that Lord *Eldon* said in *Salvidge v. Hyde* was this:—"If *Culliford* (the trustee) purchased for himself, which he could not do, and then *Laying* (the demurring Defendant) bought of him, that would be one thing—but what charge is there in the bill that *Laying* purchased what *Culliford* bought?" And there the demurrer was allowed, because it was a sale at an adequate price to a stranger who was not implicated in the breach of trust. In our case the allegations go far beyond this, and make *Bennett* a trustee.

Pearse v. Hewitt, again, was a bill asking relief against a mortgagee of trust property in a suit for the administration of the trusts, and there was no clear charge of fraud against the mortgagee, making him a trustee. *Troughton v. Binkes* was a similar case; and in *Alsager v. Rowley* the same principle was laid down, that a special case will

(a) 7 Sim. 471.

(b) 4 Beav. 158.

(c) 5 Madd. 138.

(d) Jac. 151.

(e) 1 My. & Cr. 603.

entitle you to make a debtor a party to an administration suit ; and there Lord *Eldon* observes upon a judgment of Lord *Hardwicke's*, that nothing was stated as to negligence ; and that in *Newland v. Champion* delay in the representative was also stated as one of the special cases as well as collusion.

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—
Argument.

What we allege is a positive refusal to sue after discovery of the fraud, and this is sufficient, on the principle of all the authorities.

The course which the Defendant seeks to drive us to is, first a bill against *Bright*, in which the whole fraud of *Bennett* must be proved, to get liberty to use *Bright's* name ; and then a second suit against *Bennett*, with all the same process repeated. This would be most inconvenient ; and it is not the proper course to get the use of the trustee's name, except for an action at law.

Then, as to the allegation of the assignment of the debt, the 9th section of the Statute of Frauds has no bearing upon it. It refers to an assignment by the trustee, not by the cestui que trust. We allege that the assignor does not dispute our title, and no one else has any concern with it.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

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January 16th.
—
Judgment.

This demurrer must be allowed. The bill alleges that the Defendant obtained a purchase at an undervalue of certain trust property by bribing the agent of the vendor (the trustee of a creditors' deed), thereby committing a fraud upon the creditors interested under the deed. It appears, though not very clearly, from the statements of the bill, that one *Gray* (also a Defendant) is a creditor, the amount of whose debt is not stated, but who is alleged to

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have executed the deed for a debt of £50. There is no averment, however, that the £50 was due to him. *Gray*, therefore, is described as a person once removed from the trustee, whilst the trustee would be the proper person to sue the demurring Defendant for the fraud. The Plaintiff represents himself as a person who has purchased from *Gray* this remote right of instituting a suit against *Bennett*; but he does not state when and how he acquired that right, but contents himself with alleging that he is the assignee of *Gray's* debt. These particulars are of some importance with reference to the doctrine of champerty. The only question now before me is, whether the Plaintiff avers a case which entitles him to relief against *Bennett*, regard being had to the two points—first, whether he shows a right to sue *Bennett* at all; and secondly, whether he is at liberty to mix up this suit with the other matters to which the bill relates.

As to the first point, it appears to me that the Plaintiff has not sufficiently stated his title to sue. He alleges that the creditors' deed was executed by *Todd* the debtor, and the trustees, and also "eight persons, being creditors of *Todd*, whose names appear in the schedule; one of the said creditors' names in the schedule, and who duly executed the said indenture, was *Gray*, and the amount of the debt set opposite to his name in the said schedule is £50." That being the way in which *Gray's* title is averred, the Plaintiff states his own title, by saying that he is the assignee of the debt of *Gray*, one of the creditors of *Todd*. Now, whether he is assignee in bankruptcy or insolvency, or in what capacity, and whether by any assignment in writing, contract, or agreement, there is not a word to show. In the first place, it appears to me essential that the assignment should be in writing, because the 9th section of the Statute of Frauds plainly refers to the interest of the cestui que trust, as is evident from the 10th section, where

similar words are used in the like sense. Here the Plaintiff is suing, not as assignee of the debt, but for that share of the proceeds of a sale under the trusts of the deed to which *Gray* would have been entitled under that instrument. Independently of this defect, I apprehend that it is not sufficient in a case of this complexion, where a claim is made simply under a derivative title as assignee of a debt, for a Plaintiff to allege this in general terms, without stating how he became so entitled. The Defendant ought to be placed in a condition to know how the right, whatever it may have been, of the original creditor became vested in the Plaintiff; and the more so where the right is claimed only by the circuitous title I have mentioned, and this, it may be, after the alleged refusal of the trustee to sue.

These reasons, independently of the want of an averment that the assignment was in writing, are sufficient to sustain the demurrer; and I do not think that these objections are in any way met by the allegation that *Gray* admits the title to be in the Plaintiff. *Gray* may perhaps be willing to admit anything; but it does not follow that any admission which *Gray* chooses to make will give the Plaintiff a right to sue the Defendant *Bennett*. Therefore, I am of opinion that the averments of the Plaintiff's title are wholly insufficient.

It is most important to require precision in a case of this kind, because *Bennett* has a right to demand the strictest possible averment and proof of the Plaintiff's case, where it appears that neither the trustee of the deed nor any of the creditors who signed it think fit to take proceedings to obtain relief against the alleged breach of trust, and that the Plaintiff is an assignee of a creditor whose debt is at any rate not more than £50. In a case where the Plaintiff thus appears on the face of the bill as the purchaser of a Chancery suit, the Court is bound to scrutinise with the utmost care the sufficiency of his allega-

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tions. I consider, therefore, that *Bennett* is entitled to be told on the face of the bill how and when the Plaintiff became assignee of the debt of *Gray*, and what kind of assignee he claims to be. The absence of explicit statements on these points cannot be attributed to any slip of pleading, for this is a third demurrer, one having already been allowed after argument, and a second submitted to, and the bill re-amended; and I can only ascribe the vagueness of the allegations to some reluctance on the part of the Plaintiff to show how he acquired his alleged right to sue.

Even if the bill were not defective in the particulars I have noticed, I am clearly of opinion that the demurrer for multifariousness ought to be allowed.

It has been argued, that, whenever a trustee declines to exercise his right of suit for the recovery of trust property, the property must be recovered by the person interested; but admitting this to be so, relief of this kind might have been sought in a suit which should not mix the claim against *Bennett* with the administration of the trusts, in which he is not concerned. *Pearse v. Hewitt* is a conclusive authority upon this point. It was suggested, that this would involve two suits, one against the trustee to obtain the use of his name, the other in the name of the trustee against the Defendant charged with the fraud. But this would not be so. There would be one suit against the trustee for the administration of the trusts, and in that there might be an inquiry what steps it would be proper to take to recover the property in question. If the trustee objected to sue without an indemnity, the Court would give proper directions for proceedings by the creditors interested in the trust funds. In a case which admits of being dealt with in this form, it is not right to mix up a claim for the recovery of particular property from one Defendant with the general administration of an estate in which he is not interested. *Campbell v. Mackay* was

an entirely different case. The object of the suit as against *Bennett* is simply to enable a creditor to recover from him property which the trustee declines to sue for; and this claim ought not to be mixed up with all the accounts of the trust. Therefore, I am of opinion that the demurrer must be allowed, both on account of the insufficient averments of title, and on the ground of multifariousness.

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With respect to the remaining point, namely, the looseness with which the circumstances of *Bright's* refusal to sue are averred, it is not necessary to give any decision; but it is to be observed, that the only allegations are, that, after *Bright* discovered the fraud, he refused and still refuses to sue. The bill does not state by whom he was asked to take proceedings. It may, consistently with these allegations, have been by a stranger who had no interest in the estate. As a matter of pleading, therefore, this objection would also be valid; but I am very far from expressing any opinion, that a charge that a person interested had applied to his trustee to sue for the recovery of the trust property, and that the trustee had refused to do so, would not suffice to sustain a bill. I should hesitate to say that; but a mere allegation of a refusal on the application of I know not whom is clearly not enough.

Demurrer allowed, with costs.

1862.

May 6th, 7th.

*Contribution—
Creditors' Deed
—Liability of
acceding Creditors.*

The creditors, parties to an inspection deed, severally covenanted to indemnify to a certain extent the inspectors against liabilities incurred in carrying on the business of the debtor, which they were empowered to do. One of the creditors who had executed the deed, and to whom the inspectors had incurred a large debt for goods supplied and advances made for the purpose of the business, filed a bill against the inspectors, the debtor, and all the other acceding creditors, to have the inspectors' liability wound up, and the accounts taken, and to have the assets applied in payment of his claim, and the deficiency made good by rateable contributions of all the acceding creditors (including the Plaintiff) in proportion to their debts:—

SELWYN v. HARRISON.

THE Defendant *Wilson*, an iron-founder, carrying on business under the firm of *E. B. Wilson & Co.*, at *Hunslet*, in the county of *York*, having become embarrassed, made a composition with his creditors on the 21st of June, 1849. This was effected by two deeds of the above date.

One of these deeds was a conveyance of certain property to the Defendants, *Pollard* and *Singleton*, upon trust to sell, with power in the meantime to raise £10,000 by mortgage, and to stand possessed of the proceeds under the trusts declared by the second deed:

The other deed was a deed of inspectorship, by which *Pollard* and *Singleton* were appointed inspectors, and *Wilson* was authorised to carry on his business for three years under inspection, at the end of which time, if the debts were not paid off, the property conveyed by the first-stated deed and the stock in trade were to be sold; and it was declared that the inspectors should be at liberty to raise £10,000 on mortgage of the property aforesaid or other security, by overdrawing their account, or borrowing from their bankers or other persons, and to apply or permit *Wilson* to apply the same in carrying on the business; and that the sum so borrowed should be repaid, with interest, before any division among the creditors.

The proceeds of the business were to be applied, first, in paying non-executing creditors, and in paying the excess of the debts of executing creditors beyond the amount entered in the schedule, and all debts contracted in the business after the 30th of April, 1849, and in executing the trusts, including a monthly payment of £125 to *Wilson*, and interest on mortgages; and in the next place, in paying

Held, that there was no right to contribution; and, a decree for accounts having been made in a previous suit, the bill was dismissed.

rateably the scheduled debts. Power was given to the inspectors to extend the period of three years for two years more, by indorsement, and a license and covenants given by the creditors were in such case to remain in force for the extended time; and power was given to creditors to execute for such part only of their debts as they pleased; but the deed was to extend to the residue of their debts, except for the purpose of enabling them to obtain payment of such residue *pari passu* with non-executing creditors. The deed also contained an agreement that *Pollard* and *Singleton* should be indemnified out of the estate of *Wilson* in respect of all transactions and personal engagements, matters, and things whatsoever, which they or either of them should lawfully do or cause to be done, or enter into, order, or direct, concerning the business, affairs, estate, or effects of *Wilson*, by virtue of or in pursuance of this indenture; and each of the creditors, parties thereto, of the third part, did thereby, for himself, his heirs, executors, administrators, partner or partners, and so far only as respected his or their own acts or defaults, covenant with *Pollard* and *Singleton*, that in case they, or either of them, should sustain or incur any loss, costs, charges, and expenses whatsoever, by reason or in consequence of having acted as such inspectors or inspector as aforesaid, or by reason or in consequence of their overdrawing the said banker's account to the amount of £10,000 as aforesaid, or of any advance or advances which might be made to them of such sums amounting to £10,000 as aforesaid, or of their application of such moneys, or otherwise in relation thereto, or for or by reason or in consequence of any act, matter, or thing whatsoever *bonâ fide* done by them or any of them, or arising out of or incidental to the arrangement intended by the now-stating indenture and the said indenture of even date therewith, or any of them, to be carried into effect, then and in such case each of the parties to the now stating indenture of the third part, his heirs, executors, administrators'

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partner or partners, would and should, upon demand, pay to the person or persons having incurred or borne such loss, costs, charges, or expenses, a sum or sums of money bearing such proportion to the whole amount of such loss, costs, charges, or expenses as the debt or debts of such covenanting creditors set forth in the said schedule at the foot of the now stating indenture written, and in respect of which dividends were made payable under the now stating indenture, bore to the aggregate amount of the debts in the said schedule in respect of which dividends should be payable as aforesaid, and would and should, in the same proportion as aforesaid, save harmless and keep indemnified *Pollard* and *Singleton*, and each of them, and the heirs', executors', and administrators' estate and effects of each of them, and every other inspector for the time being, and his heirs', executors', and administrators' estate and effects, from and against all actions, suits, proceedings, losses, costs, charges, expenses, damages, and other injury in any way occasioned by, arising out of, or incidental to the trusts, duties, powers, or discretions reposed in them by the now-stating indenture or the said deed of conveyance.

The inspectorship deed was executed by *Wilson*, by the inspectors, and by and on behalf of several creditors' firms, among which was the *Bowling Iron Company*, on whose behalf the deed was executed by *Pollard*, who was one of the managers of that company.

On the 9th of June, 1852, the inspectors extended the deed for two years.

After the execution of this deed the business was managed by *Wilson*, under the supervision of the inspectors, until the 18th October, 1852, when it was arranged that the business should in future be carried on under the firm of the "Trustees of *E. B. Wilson & Co.*;" that *Wilson* should be allowed £750 per annum, and that the Defendant, Sir *T. H. Roberts*, should assist the trustees in the management, with a salary of £600 per annum.

A deed dated the 18th of October, 1852, was prepared to confirm this arrangement, under the hands and seals of the creditors, but it was executed only by *Wilson* and the inspectors.

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The bill alleged that the creditors, parties to the inspectorship deed (all of whom were made Defendants), acceded to the deed of 1852; but this was disputed by several of the Defendants.

In March, 1853, the inspectors discharged Sir *T. H. Roberts* from being manager, and continued the business with the assistance of an agent.

At the expiration of the extended term a deed was prepared, dated the 10th of January, 1855, purporting to authorise the inspectors to postpone the sale for a further period of two years, and in the meantime to exercise the trusts and powers of the earlier deeds. This deed was executed by *Wilson*, and on behalf of the Plaintiff and of several of the Defendants; and the bill alleged that all the other Defendants acceded, which was denied by some of them.

In 1856, Sir *T. H. Roberts* filed a bill, claiming to be interested in the ultimate surplus under an agreement with *Wilson*, and praying for accounts of the inspectorship: and in the same year *Pollard* filed a bill for the execution of the trusts of the inspectorship deed and other relief. By an order made in these two suits, *Pollard* and *Singleton* were appointed receivers and managers of the business; and by the decree in both causes, dated the 6th of July, 1857, inquiries were directed whether the debts were paid, and the trusts of the inspectorship deed performed, and whether the debts could be fully paid and the trusts fully performed out of the profits of the business; or otherwise, whether it was proper that the business should be carried on by *Pollard* and *Singleton*; and accounts

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were directed on the footing of the deed. *Pollard* afterwards ceased to be a manager of the Plaintiff's company, and *Selwyn*, another manager of that company, was appointed Plaintiff in his place. Many of the Defendant creditors had supplied goods to the inspectors for carrying on the business, and had been paid for the same. The Plaintiff's company had also supplied goods, and made advances to the inspectors for the purposes of the business, and a debt of about £60,000 was due to them. The inspectors had also overdrawn their banking account by about £16,000. The business proving unprofitable in the year 1858, the remaining assets were in the year 1859 ordered to be sold, and a sum of about £30,000 was realised and paid into Court, and assets of the value of about £8,000 remained unsold.

The Plaintiff filed this bill, claiming to have the assets applied in payment of the debt of the company, and to have the deficiency made good by rateable contributions of the creditors (including the Plaintiff's company), who were entitled to the benefit of the inspectorship deed, in proportion to the debts for which they executed. The bill also prayed that the inspectorship might be finally wound up, and for accounts, and that such of the proceedings in the former suits as the Court should think fit might be adopted.

The cause now came on upon motion for decree, together with the causes of *Pollard v. Wilson*, and *Roberts v. Pollard*, on further consideration.

Argument.

Mr. Giffard, Q.C., and Mr. Cadman Jones, for the Plaintiff:—

The inspectors, or rather trustees, who carried on the business, were clearly entitled to have liabilities bona fide contracted by them on account of the business treated as valid as between them and the cestuis qui trust under the deed, whether such liabilities were or were not strictly

within the powers of the deed. Whatever, therefore, was bona fide borrowed by the trustees became in substance a debt of the trust, and the trustees would be entitled to an indemnity against such liabilities from all the persons interested, and this even without the special indemnity clause in the deed : *Re German Mining Company* (a), *Re Norwich Yarn Company* (b), *Troup's case* (c), *Baker's case* (d), *Ex parte Boulton Re Sketchley* (e). The inspectors having a right to contribution to provide them with funds to meet our claim, we are consequently entitled, if only to avoid circuitous proceedings, to have the trusts executed, the debt provided for, and the inspectors indemnified in a single suit; and this is relief which the decree in the former suits would not give us.

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Mr. Daniel, Q.C., and Mr. Sargent; Mr. Dickinson and Mr. Speed; Mr. Willcock, Q.C., Mr. Amphlett, Q.C., and Mr. Barker; Sir H. Cairns, Q.C., and Mr. Hardy; Mr. Rolt, Q.C., and Mr. C. Browne; Mr. James, Q.C., and Mr. Wickens; Mr. Cole, Q.C., and Mr. Nalder; Mr. Everitt, Mr. Springall Thompson, Mr. Humphrey, and Mr. Freeman, appeared for the various Defendants.

Certain special cases, which it is not necessary to state, were opened in argument on behalf of different Defendants, but the following points were common to all :—

1. That the creditors were liable only by virtue of the terms of their covenant, and that that was a several covenant creating no joint liability.

2. That at most the liability of each creditor was limited to his rateable share of £10,000.

3. That the inspectors were the only persons who could insist on this indemnity; and that the Plaintiff, whether

(a) 4 D. M. & G. 19.

(c) 29 Beav. 353.

(b) 22 Beav. 143.

(d) 1 Dr. & Sm. 55.

(e) 1 De G. & Jo. 163.

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as a cestui que trust under the deed, or as a lender to the inspectors, had no right to sue on the covenant.

4. That the only right of the Plaintiff was against the assets, which was not disputed by any one, and which might be satisfied under the previous decree.

5. That the only way in which the bill could be sustained would be by treating all the creditors as partners; and this view was negatived by the House of Lords, in *Cox v. Hickman* (a).

The following cases were also cited:—*Re Stanton Iron Company* (b), and *Gillan v. Morrison* (c).

Mr. Giffard, in reply :—

It would be impracticable for the inspectors to proceed separately against each cestui que trust on the covenant. The Plaintiff and the Defendants are all under a common liability to contribute rateably to indemnify the inspectors. The only practicable or proper mode of dealing with such aggregate liabilities is by a suit, to ascertain the proportion which each should pay. How else can the liabilities be apportioned? Such a suit may be instituted either by the trustees, or by any one of the cestui que trusts who desires to have the extent of his liability ascertained once for all, and in this character the Plaintiff is entitled to maintain this suit. I do not admit that the covenant is the sole ground of liability, there being a general liability, on the principle of the *Worcester Corn Exchange* case (d); but whatever be the limit of the liability, the Plaintiff is clearly entitled to have his proportion ascertained in the presence of the creditors and the inspectors, and this can only be done by a suit like the present.

(a) 8 H. L. Cas. 268.

(b) 21 Beav. 164.

(c) 1 De G. & Sm. 421.

(d) 3 D. M. & G. 180.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

There is one circumstance which entirely distinguishes this case from the case of the *German Mining Company*, and others of that class. Assuming, for the sake of argument, that the Plaintiff is right in his contention that the *Bowling Iron Company*, which he represents, are entitled to stand in the position of the trustees, and that all the creditors are cestuis qui trust, there still remains the question, whether there is any joint liability on the part of the creditors to indemnify the trustees. That was the foundation of the judgment in the case of the *German Mining Company*; but the application of that principle is wholly out of the question, when you find that the persons who are designated as trustees have accepted a covenant by which they hold themselves out as content to fix a certain limit to the aggregate liability of all the persons who may accede to the deed, and that the indemnity contended for is one far beyond that limited amount. Both those who take the benefit of, and those who grant, an indemnity, may be supposed to look with some anxiety to its extent; and it would be a great surprise upon creditors who had entered into a covenant to bear their proportions of a liability of £10,000, to be told that they were subject to an indefinite liability for all acts, matters, and things bona fide done by the trustees. It would equally surprise them to be told, that, though each covenanted only for his own proportion, they were all jointly liable for the whole, and, if compelled to pay, might recover contribution, as they could, from the other creditors.

If a joint and several covenant had been taken, it would be different; but the covenant is, in express terms, a several covenant only.

It appears to me that no creditor is liable to indemnify the trustees against more than his own rateable proportion of the debt incurred, and that only to

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an aggregate extent of £10,000: The analogy of suretyship fails altogether. A surety may recover contribution from co-sureties, because he is liable for the whole amount, and ought only to bear his share. The principal creditor may proceed against which surety he pleases; but that is not allowed to affect the rights of the sureties as between themselves. Mr. *Giffard* asked, in his argument, how the apportionment of the liability could be arrived at except by a suit like this. The answer is, by the course which was taken in the suit of *Pollard v. Wilson*. The decree in that cause has done all that is required. Under that decree all the accounts of the trust will be taken; the trustees can prove the amount of any outstanding liabilities to which they are subject, and the determination of the amount would be conclusive and binding on all the creditors; and on that amount being ascertained, the liabilities of the creditors would be determined. It was contended, however, that in a suit instituted by one person on behalf of all the scheduled creditors, the other creditors would not be bound; but even if that were so, it would amount to nothing, because then the Defendants, the trustees, might insist that all the cestuis qui trust should be brought before the Court. However, in this case no difficulty of the kind could arise, because each creditor has simply to ascertain once for all what is the amount of his own liability; and if he has that determined as against the trustees, it is immaterial to him to know what the liability of the other creditors may be. There is no privity whatever between one creditor and another in this matter. Each has to ascertain what he himself has to pay, and the amount of the contribution of the rest is to him a matter of perfect indifference. Therefore, even supposing that the other creditors would not be bound by the accounts in *Pollard v. Wilson*, the decree in that suit would give the Plaintiff all the relief he seeks in this.

The other point insisted on was, that the Plaintiff was entitled to stand in the shoes of the trustees. The argu-

ment amounts to this: The Plaintiff is a creditor of the business; the trustees have a certain fund, against which they can go to make good the liabilities of the concern; that fund consists of the contributions of the scheduled creditors; those contributions are therefore assets of the business, and subject to the Plaintiff's claim as a creditor.

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Now that is a species of equity which is sometimes asserted with effect. It is commonly, however, coupled with a charge of fraud or collusion against the trustees in refusing to exercise their right; and the want of this element has, in the absence of other special circumstances, generally been held to be a bar to the relief. But apart from this, an equity of this kind has never been enforced, except where the right of the trustee has been quite clear; and, certainly, not where there are numerous distinct equities affecting the cases of the different persons who are said to be liable. Here there are various special defences set up by different classes of the creditors, and all this would have to be dealt with before effect could be given to the circuitous equity on which the Plaintiff relies. It is a sufficient answer to say that there are various arguable defences raised on different grounds as against the trustees by different creditors, to show how impossible it would be in a suit like this to set on foot proceedings against all these different persons. Nor is it necessary to do so; for when once the total amount which *Pollard* and *Singleton* are entitled to claim, is ascertained under the existing decree, it will be open for the Plaintiff, if he pleases, to obtain leave to proceed in their names, but, of course, at his own risk, against any creditors whom they may not think fit to sue.

This is not a case, therefore, in which a bill by a cestui que trust can be sustained, for enforcing the various claims which the trustees may have against these numerous Defendants. It would be almost the same case, if a creditor of an estate,

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in suing the trustees, should bring before the Court, as Defendants, all the persons who might be indebted to it. It is material also to observe, that no mala fides is alleged in *Pollard* and *Singleton* for not enforcing their claims; and I infer that the Plaintiff is in no way damnified by their omission to do so, and that he can obtain all that he is entitled to in the suit of *Pollard v. Wilson*.

I hold that the Plaintiff is not entitled to have the contribution which is the object of his suit; and as the rest of the relief may be had under a decree already made, this bill must be dismissed with costs, with the exception of the costs of *Roberts*, who stands in a different position from the other Defendants.

8 CR 584
72 R 12.61
1889.591

32 Bea 612

8 ap. Ca. 422

Feb. 26th, 28th,
March 21st.

Settlement—
Recital—Cove-
nant to settle
future property
—Election—
Married Wo-
man.

A marriage set-
tlement con-
tained a recital
of an agree-
ment that the husband should covenant to settle future property coming to the wife, followed by an agreement by all parties, and a covenant by the husband, that the wife's future property should be settled:—*Held*, that property bequeathed to the wife's separate use was bound by the covenant. The mere omission of a recital of an intention that the wife should covenant, *held* not to narrow the construction.

A married woman having, by her marriage settlement executed when a minor, covenanted to confirm the settlement and also to settle future property, and having acquired by bequest personal property to her separate use:—*Held* bound to elect either to bring the bequest into settlement, or to make compensation out of certain reversionary personalty and other property to which she would be entitled under the settlement for her separate use with a restraint on anticipation.

The covenant being to settle "any real or personal estate or effects" on trusts for sale and investment:—*Held*, that no exception could be implied as to specific jewels.

WILLOUGHBY v. MIDDLETON.

IN the year 1843 *Henry Willoughby* the younger, afterwards Lord *Middleton*, married *Julia L. Bosville*, then an infant of the age of eighteen, and entitled in reversion, on the death of her mother *Matilda Bosville*, to certain sums of trust stock.

The settlement made on the said marriage, and dated the 1st of August, 1843, recited, among other things, that it had been agreed that the said *Henry Willoughby* the younger should enter into the covenant thereafter on his part contained, in regard to the settlement of the estate and effects to which the said *J. L. Bosville* might thereafter during her said intended coverture become or be entitled, and contained covenants that the said *Henry Willoughby* the younger, on becoming entitled to the rents of the settled estates of the then Lord *Middleton*, would grant rent charges of £1000, £1000, and £3000 in different events; and the said *J. L. Bosville* and *H. Willoughby* the younger assigned to trustees the said sum of stock upon trust for the wife for life for her separate use without power of anticipation, remainder for the husband for life, remainder upon trust, in the event of the husband dying in the lifetime of the wife leaving children, as to one moiety, to transfer the same to the wife, and as to the other moiety upon trusts for the benefit of the younger children, and if no younger children who should take a vested interest, then for the eldest or only son, and if he should die in the lifetime of his mother then to her absolutely; and in the event of the husband surviving the wife, then upon trust as to the whole for younger children; and if no younger children who should take a vested interest, then for the eldest son if he should attain twenty-one; and if no such son then for the appointees, or in default for the next of kin of the wife.

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 —
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The settlement also contained the following clauses:—

“And this indenture moreover witnesseth, and the said *Julia Louisa Bosville* doth hereby for herself, so far as she lawfully can or may, covenant, promise, and agree with and to the said *Denzil Ibbetson Thomson*, *John Cox*, and *James Parke*, their executors, administrators, and assigns, that she the said *Julia Louisa Bosville* shall

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and will, in the event of her surviving the said *Henry Willoughby* the younger, her said intended husband, at the request of the said *Denzil Ibbetson Thomson*, *John Cox*, and *James Parke*, or the survivors or survivor of them, his executors, administrators, or assigns, or the trustees or trustee of these presents for the time being, make, do, and execute all such acts, deeds, matters, and things whatsoever for the corroborating, confirming, and giving effect to these presents, and every clause, matter, and thing therein contained, and which shall then remain to be performed or executed, and for the better enabling the said *Denzil Ibbetson Thomson*, *John Cox*, and *James Parke*, or the survivors or survivor of them, his executors, administrators, or assigns, or the trustees or trustee of these presents for the time being, to carry the trusts thereof into execution so far as the same shall be then subsisting and remain to be performed and executed, as by the said *Denzil Ibbetson Thomson*, *John Cox*, *James Parke*, or the survivors or survivor of them, his executors, administrators, or assigns, or their or his counsel in the law shall be reasonably advised or required.

"And this indenture further witnesseth, and it is hereby agreed and declared by and between all the said parties to these presents, and the said *Henry Willoughby* the younger doth for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said *D. J. Thomson*, *J. Cox*, and *J. Parke*, their executors, administrators, and assigns, that in case the said *Julia Louisa Bosville*, or the said *H. Willoughby* the younger in her right, shall at any time or times during the said intended coverture become seised or possessed of or in anywise entitled to any real or personal estate or effects, or sum or sums of money whatsoever, either by gift, devise, descent, bequest, or by or under the intestacy of any person or persons whomsoever, or in any other manner whatsoever, then and in such case such real and personal estate or effects

shall be forthwith paid, conveyed, assigned, and assured, so and in such manner as that the same may become vested in the trustees or trustee of these presents for the time being, their or his heirs, executors, administrators, or assigns, upon trust to sell, dispose of, and convert into money all such real estate, and so much and such part of all such personal estate as aforesaid as shall not consist of moneys, and either by public sale or private contract, and in such manner as to them or him shall seem meet; and the moneys so to be received and to arise from such sale or sales and conversion as last aforesaid shall be forthwith laid out and invested in the public stocks or funds, or on Government or real securities in England, in the names or name of the said trustees or trustee for the time being.

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“And it is hereby further agreed and declared, that the said trustees or trustee for the time being, their and his executors, administrators, and assigns, shall stand possessed of the stocks, funds, and securities whereupon or wherein the trust moneys last aforesaid shall be laid out and invested upon and for such and the same trusts, intents, and purposes, and under and subject to such and the same powers, provisoes, declarations, and agreements as are hereinbefore expressed, declared, and contained, of and concerning the annuities, stocks, funds, moneys, and securities hereby appointed and settled, or such of the same trusts, intents, and purposes, powers, provisoes, declarations, and agreements as shall be then subsisting, undetermined and capable of taking effect.”

The settlement was executed by the wife, but was never confirmed after she had attained her majority.

By a deed dated the 18th of May, 1848, a rent charge of £4000, to commence from the death of *Henry Willoughby* the younger, was granted to the said *J. L. Willoughby* out of the settled estates, and the same were resettled upon the said *H. Willoughby* the younger for life, remainder to his

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eldest son for life, remainder to his first and other sons in tail male, with remainders over.

The said *Henry Willoughby* afterwards became the present Lord *Middleton*, and there were several children of the said marriage, all minors at the present time.

The mother of Lady *Middleton* bequeathed all her jewels, trinkets, and paraphernalia, plate, linen, china, books, furniture, moveable goods and chattels, and all her moneys, securities, and personal estate (with some exceptions) to Lady *Middleton* for her separate use.

Lady *Middleton* claimed not to be bound by the settlement to bring this bequest for her separate use into settlement; and that at any rate the jewels, trinkets, paraphernalia, plate, linen, china, books, and other articles of the like nature ought and were intended to have been excepted from the covenant, and that the settlement should be rectified accordingly.

The bill was filed by the trustees to obtain the direction of the Court on these and other points.

Argument.

Mr. *Daniel*, Q.C., and Mr. *Parke*, for the Plaintiffs.

Mr. *Reilly*, for Lord *Middleton*.

Mr. *Chitty*, for Lady *Middleton* :—

First. On the construction of the settlement (irrespective of the fact that Lady *Middleton* was a minor) the covenant, explained as it must be by the recital, does not import any contract by the lady. The recital is, that it had been agreed that the said *Henry Willoughby* the younger should enter into the covenant thereafter on his part contained in regard to the settlement of the estate and

effects to which the wife might thereafter during her intended coverture become or be entitled; and there is no suggestion of an intention to do more than bind the husband in respect of the property which he might acquire in right of his wife.

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—
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The recital, being thus limited and perfectly unambiguous, explains the ambiguous language of the covenant, which runs in this unusual form:—"It is hereby agreed and declared by and between all the said parties to these presents, and the said *Henry Willoughby* the younger doth for himself, and his heirs, executors, and administrators, covenant, promise, and agree" with the trustees, that, in case the wife shall acquire any real or personal estate, it shall be conveyed and assigned to the trustees, upon trust to sell and stand possessed of the proceeds on the trusts of the settlement.

This may fairly be read (and coupled with the recital must be read), not as a covenant by all parties that the property shall be settled, which would make it a covenant by the wife as well as by the husband, but as a common agreement of all parties that the husband should covenant, and a covenant by him accordingly.

What makes this construction the more reasonable is the circumstance that when it is intended to introduce a covenant by the wife (namely, for the purpose of confirming the settlement,) very different language is used. In this case the covenant runs thus:—"The said *Louisa Bosville* doth hereby for herself, so far as she lawfully can or may, covenant, promise, and agree" with the trustees, that she will confirm the settlement. On the whole instrument, therefore, the true construction is, that this is a covenant by the husband alone: *Reid v. Kenrick* (a), *Ramsden v. Smith* (b), *Brooks v. Keith* (c), *Re Neal's Trusts* (d).

(a) 1 Jur. N. S. 897.

(c) 1 Dr. & Sm. 462.

(b) 2 Drew. 298:

(d) 4 Jur. N. S. 6.

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Secondly. The property which is now in question includes jewels and specific chattels, to which the trust could not be intended to apply; and the covenant at any rate will be construed so as to exclude property of this description.

Thirdly. If the Court is against me on the construction, still this covenant was not binding by reason of the minority of the lady; and it cannot operate by way of election, because a married woman cannot be compelled to elect. This was held by the Master of the Rolls in *Campbell v. Ingilby* (a), and the doctrine was not touched by the Court of Appeal (b).

The nearest approach to anything like election in the case of a married woman is where she is seeking relief in the nature of specific performance of part of an instrument, other part of which she (not being bound) declines to carry out. In that special case the Court, on the principle that a Plaintiff who seeks equity must do equity, may make the fulfilment of the onerous part of the instrument a condition of granting relief on the rest of it. That was in substance the case of *Savill v. Savill*; and in *Milner v. Harewood* (c), election was expressly provided for by the deed itself. There is, therefore, nothing in these authorities to throw doubt on the clear decision of the point by the Master of the Rolls in *Campbell v. Ingilby*.

The true way of stating the doctrine is, that it depends on the existence of a condition, express or implied; and the fact that an heir claiming against an unattested will cannot be put to election is an illustration of this limitation of the doctrine. There is in that case no condition in the will, and therefore no election, and it is the same here. The common form of saying that you cannot claim under and against an instrument is not accurate: *Warren v. Rudall* (d).

(a) 21 Beav. 567.

(b) 1 De G. & J. 393.

(c) 18 Ves. 259.

(d) Johns. 13.

[The VICE-CHANCELLOR.—That case turned on the question whether there was an intention to impose a burden, or only to confer a benefit.]

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Mr. Chitty.—That brings it to my contention, that the test is, whether an implied condition is to be found in the instrument.

Further, the wife cannot make compensation out of her interest under the settlement, because it is all either reversionary personalty or settled with a restraint on anticipation.

Mr. Waley, for the children :—

As to the construction, it is settled that where there is an agreement by all parties that future property shall be settled (in the passive form), the wife's separate estate is bound: *Butcher v. Butcher* (a).

Reid v. Kenrick and *Ramsden v. Smith* are quite distinguishable, on the ground that the thing to be done was a conveyance "by the husband," and that made the covenant applicable to the husband's interest only. *Brooks v. Keith* turned entirely on the special form of the covenant.

On the covenant alone, therefore, it is clear that the wife (but for her minority) would be bound, and the mere absence of a recital of such an intention cannot nullify the operative words. It is different where the recitals are repugnant; but the only argument here is founded on the bare fact that a recital, which might have been inserted, was omitted.

Then as to the liability of a married woman to elect, *Savill v. Savill* (b), and *Anderson v. Abbott* (c), are clear

(a) 14 Beav. 222.

(b) 2 Coll. 721.

(c) 29 Beav. 457.

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authorities; and the doubt in *Campbell v. Ingilby*, supposing it to be law after the significant reservation of opinion on the point by the Court of Appeal, was founded solely on the supposed impracticability of compelling a conveyance of realty by a married woman. No such difficulty occurs here.

Mar. 21st.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

After stating the effect of the settlement, His Honour proceeded as follows :—

The one question which arises is, whether the property that has devolved on Lady *Middleton* is to be brought into settlement by the doctrine of election. It clearly can be reached in no other way, because the lady was an infant at the time when the settlement was executed, and has done no subsequent act to confirm it.

I think the law is settled on the authorities beyond all reasonable doubt. A covenant for the settlement of future property, which purports not to bind the wife, but only to operate on property which may fall under the marital control, will not affect the separate estate of the wife; but, on the other hand, a general covenant by all parties that future property which may devolve on the wife shall be brought into settlement, will extend to her separate property. In the last case, if the wife was an infant at the time of executing the settlement, she cannot take the benefit of any part of the deed without giving effect to the whole. Among many other cases *Anderson v. Abbott* is a clear authority for this position, and I refer to it the more readily because it is a decision of the same learned judge who came to a different conclusion on the peculiar circumstances

which arose in *Campbell v. Ingilby*. In *Anderson v. Abbott* the Master of the Rolls held, that where a husband, on the faith of his settlement, had allowed property which came to him by his marital right to go to his wife for life, under the provisions of the deed, the wife who claimed this life estate was bound to allow the rest of her property to devolve in the manner proposed by the settlement, although she was an infant at the time of its execution. *Campbell v. Ingilby*, which was mainly relied on in support of the opposite contention, was a very complicated case, and the judgment went upon various grounds, some of which have no bearing on the point before me. The claimants there were appointees of the wife, and one question was, whether they could take under the appointment without making compensation out of the real estate, which had not been effectually bound by the settlement. The Master of the Rolls dwelt much on the difficulty of enforcing the doctrine of election against a married woman in respect of real estate, otherwise than by an acknowledged deed. That difficulty, as I had occasion to observe in *Barrow v. Barrow* (a), was surmounted in *Savage v. Foster* (b), a case which is commented on in *Jackson v. Hobhouse* (c), where Lord Eldon observed that the wife in that case had the power of conveying by fine. The case before me, however, does not raise this difficulty, which I have only mentioned as showing what it was that pressed upon the mind of the Master of the Rolls in deciding the case of *Campbell v. Ingilby*. On the appeal before the Lords Justices the judgment turned on totally different considerations, which have no bearing on the question before me.

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Savill v. Savill, before Lord Justice Knight Bruce, when Vice-Chancellor, is an instance in which election was enforced as against the representatives of a wife who had

(a) 4 K. & J. 409.

(b) 9 Mod. 35.

(c) 2 Mer. 488.

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married when an infant. They were not allowed to claim real estate so as to disappoint the husband, without making compensation out of the interest which came to the wife under the settlement. This was substantially to enforce the doctrine of election as against the interest taken by the wife. Holding, therefore, that the doctrine of election may be applied to the case of a married woman, the only question I have to consider is, whether the covenant is in form a covenant by the wife, or by the husband alone with respect to property coming under his marital power.

The only possible doubt upon the construction arises on the words which describe the subject-matter of the covenant as property which may come to the wife "during her intended coverture," which may be supposed to point to the exclusion of the marital right as the purpose of the covenant; but this would be far too slender an inference on which to found the construction of the clause. On the other hand, the stipulation is in the passive form—not that the husband shall convey, but that the property shall be conveyed—a distinction on which Vice-Chancellor *Kindersley* laid great stress in *Ramsden v. Smith*, as taking that case out of the scope of *Butcher v. Butcher*. And, indeed, it is impossible to doubt that an agreement by all parties that property shall be dealt with in a particular way, is a covenant by those parties, whose concurrence is required, to give effect to the provision, with those who are to take the benefit of the transfer. Without overruling all the authorities, I cannot say that this is not, on the face of it, a covenant by all parties. It was contended, that the intention to introduce a covenant by the wife is not mentioned in the recital, which refers only to a covenant by the husband; still it would be very strange to hold that the absence of a recital of intention is to invalidate an actual covenant. Even if this argument were sound in itself, a complete answer would be furnished by the express covenant by the wife, as far as she

lawfully could, to do all acts necessary to confirm the settlement. That clearly extends to give effect to the whole settlement, including the provision for bringing in her future property. On principle, therefore, I cannot say that there is not an engagement sufficient on the face of it to bind the wife to bring her future separate estate into settlement, and, consequently, if she seeks any benefit under the instrument, she must give effect to the whole of it, including the engagement as to her future property.

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Then the question arises, what she is to do if she elects against the deed. She says, she takes under the deed nothing but a reversionary interest which cannot be dealt with, and certain property settled to her separate use without power of anticipation. But the correct view, in my opinion, is this,—that, when the doctrine of election intervenes, it takes the fund out of the settlement. This fund cannot be claimed without giving up the property which is referred to in the covenant; and, if this is not done, the fund becomes in equity no longer subject to the provisions of the settlement. It ceases to be a settled fund. The husband settled it on his wife with a restraint on anticipation, on the faith that all the provisions of the settlement would be carried into effect. The wife, therefore, cannot touch the fund given to her for her separate use with a restraint on anticipation, except by bringing in the other property so as to make good the rights of all parties interested under the deed.

A minor question was raised, as to which, unfortunately, there is no room for doubt. The covenant is express, that "any real or personal estate" which comes to the wife is to be conveyed to the trustees. However inappropriate such a disposition may be in the case of jewels and the like, I must hold that they are included. Of course, goods *quæ ipso usu consumuntur* would not be included, but everything else (unless the election should be against the settlement) must pass to the trustees.

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 Judgment.

There will be a declaration that Lady *Middleton* is bound to elect either to give effect to the whole settlement, or to avail herself of the gift to her separate use, making compensation out of the interest which she would otherwise have taken under the settlement to the extent of the fund thereby withdrawn from it. This will be without prejudice to any question as to how far she would be bound by any election as to the jointure or rent charge.

Mar. 8th, 21st.

Will—Condition—Restraint on Marriage—Widow.

By a will, certain trusts were declared for the benefit of the widow of testator's nephew and her children, under which the widow was entitled to certain rents of real estate, and to annuities charged primarily on real estate, and to be made up, if necessary, out of personal estate, with a condition subsequent that the trusts for the benefit of the widow should cease if she married:—*Held*, that the condition was valid.

1929 632.
 1863 D. 400
 24th 192.

NEWTON v. MARSDEN.

A SPECIAL CASE.

William Frost, by his will dated the 1st of November, 1859, appointed *Caroline Derbyshire*, the widow of his nephew *John Derbyshire*, and certain other persons, executrix and executors of his will, and devised certain real estates to the said *Caroline Derbyshire* for life, remainder to testator's great nephew *William Derbyshire* (son of the said *John Derbyshire*), charged with legacies of £50 each for four other children, *John*, *Joseph*, *Caroline*, and *Annie*, of the said *John Derbyshire*; and in case either of the said legatees should die under twenty-one, the legacies to go over to their respective next of kin, exclusive of their husbands or wives and of the said *Caroline Derbyshire*.

The testator devised other real estate to his said trustees, upon trust out of the rents to pay to testator's nephew *Thomas Frost* an annuity of £8 for life, and the residue of the rents to the said *Caroline Derbyshire* (widow), until his great nephew the said *William Derbyshire* should attain twenty-one, if she should so long live, for the maintenance and support of herself,

and the maintenance, education, and support of the said *William Derbyshire*; and on his attaining twenty-one then upon trust out of the rents to pay to the said *Caroline Derbyshire* (widow), an annuity of £6 for life, and subject thereto for the said *William Derbyshire* absolutely. The testator declared similar trusts of certain other parts of the said trust estate, except that the names of brothers and sisters of the said *William Derbyshire* were inserted in them respectively in place of the said *William Derbyshire*, and in the event of any of the said great nephews and great nieces dying under twenty-one leaving issue, the issue were to take, and in the event of any of the said great nephews and nieces dying under twenty-one without leaving issue, the survivors were to take. And the testator bequeathed his residuary personal estate upon trust to make up any deficiency in the rents for payment of annuities and, subject to certain legacies, unto and between his said great nephews and great nieces in equal shares, and in case of their death under twenty-one to their next of kin exclusive of husbands and wives and of the said *Caroline Derbyshire* (widow), and of one *Ann Ashton*.

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 Statement.

And the will contained the following clause:—

“And I declare that if the said *Caroline Derbyshire* (widow) shall marry again, then that the trusts hereinbefore contained for payment to her, during the infancy of the said *William Derbyshire*, *Frederick Derbyshire*, *John Derbyshire*, *Caroline Derbyshire*, and *Annie Derbyshire*, of the rents and profits of the hereditaments and premises hereinbefore devised to or in trust for them respectively, and the trusts for payment of the said several annuities hereinbefore given to or in trust for her the said *Caroline Derbyshire* (widow), shall thenceforth absolutely cease and be void.”

The testator died on the 27th of April, 1860.

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 ———
Statement.

The said *Caroline Derbyshire* intermarried, on the 2nd of April, 1861, with the Defendant *Benjamin Marsden*.

The following questions were submitted:—

First, Whether, by the said marriage, the trusts for payment of rents to the said *Caroline Marsden* during the infancy of the great nephews and nieces had ceased and become void.

Secondly, Whether by the said marriage the trusts for payment of annuities to the said *Caroline Marsden* had ceased and become void.

Argument.
 ———

Mr. *Hislop Clark*, for the Plaintiffs the trustees.

Mr. *Archibald Smith*, for Defendants *Marsden* and wife:—

This is a condition subsequent in general restraint of marriage, and is invalid.

It is admitted on one side, that if the person sought to be restrained had been the testator's widow, the condition would have been good, and on the other, that if she had been a spinster it would have been bad. The principle of the law is public policy, whereby conditions in restraint of marriage are generally void. An exception is a husband in the case of his own wife, or a wife in the case of her own husband, the ground of the exception in the first case being the interest a man has in his wife's remaining a widow: *Bacon's Abridgment*, Legacies (F.), *Grace v. Webb* (a), *Lloyd v. Lloyd* (b). A testator can no more impose this condition on a widow not his own than he can on a widower.

(a) 15 Sim. 384.

(b) 2 Sim. N. S. 255.

There is no express decision on the present point, but the law is so laid down in *Bacon's Abridgment*, Legacies (F.), referring to *Godolphin's Orphan's Legacy*, pp. 45, 56, which, however, does not bear it out; and the authority is, therefore, *Bacon's*, which is considerable. *Rishton v. Cobb* (a) supports the same view.

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There are no authorities against this.

In *Scott v. Tyler* (b) Lord *Thurlow* says, "a condition that a widow shall not marry is not unlawful;" but he is speaking of the testator's widow, as appears from his reference to the *Novels*, ch. 44, which relates to the case of a man imposing a condition on his own wife. The same observation applies to the words of Vice-Chancellor *Wigram* in *Morley v. Rennoldson* (c); and the expressions of Lord Justice *Knight Bruce*, in *Heath v. Lewis* (d), do no more than imply what is admitted, that the point has not been authoritatively settled.

Mr. *C. Chapman Barber*, for the Defendants interested on failure of the gifts to the widow.

A condition in restraint of a widow's marriage is not void: 2 *Jarm. Wills* (e), *Scott v. Tyler* (b), *Morley v. Rennoldson* (c), *Heath v. Lewis* (d).

The authorities which speak of the lawfulness of the condition as regards a widow never confine it to the testator's or donor's widow. The difference between the lawfulness of the condition as regards a first and a second marriage is recognised by Lord *Mansfield*, and *Aston, J.*, in *Lowe v. Peers* (f). *Baker v. White* (g) shows, that, as a bill to deliver up the bond was sustained, the bond must have been valid

(a) 9 Sim. 615.

(b) 2 Bro. C. C. 431, 488.

(c) 2 Hare, 570.

(d) 3 De G. M. & G. 954.

(e) Page 40.

(f) 4 Burr. 2225.

(g) 2 Vern. 215.

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at law : *Cruise's Digest* (a). The cases cited on the other side all apply to personal estate. This is a case of real estate.

Judgment.
 ———

VICE-CHANCELLOR SIR W. PAGE WOOD :—

It is singular that the point raised by this special case should never have been determined ; but after looking at the authorities on the general subject, in the consideration of which I have been assisted in every possible way by the arguments of counsel, it is clear to me that the specific point is new. The facts are these : A testator made the following provision for the family of a deceased nephew. He devised certain real estate to the widow for life, with remainder to the eldest son, charged with legacies to the other children. He gave other real estate (subject to a small annuity) to the widow during the minority of the eldest son, for the maintenance of herself and the said son, and, on his attaining twenty-one, an annuity was to be paid to the widow out of the rents, and the residue was to go to the son. Other real property was left in a similar way for the benefit of the widow and each of the other children. And the residuary personal estate was bequeathed upon trust to make up any deficiency of the rents for payment of the annuities, and then, subject to certain legacies, among the children in equal shares.

At the end of the will comes the following clause :—
 [His Honour read the clause avoiding the gifts to the widow in the event of her marriage.] The lady has married again, and the question is, whether this condition is void as in restraint of marriage.

There is no question here of a gift over. Certain rents

(a) Vol. II, Condition, chap. 1, sect. 66.

and annuities are given upon trust for the widow, and these are to cease and be void upon her second marriage. It is admitted on the one hand, that there is no precedent for holding such a condition void ; and on the other, that there is no decided case which determines how far it is permitted to impose such a restraint upon the marriage of a widow. After referring to the various authorities which were cited, I cannot even find anything in the shape of opinion of a clear and definite kind. Mr. *Archibald Smith*, indeed, who argued against the validity of the condition, commenced by citing a passage from *Bacon's Abridgment*, where it is said that such a condition is good if to a man's own wife, because of the husband's interest in his wife remaining a widow ; but that if a stranger gives a legacy on this condition it is void, because there is no more reason for restraining a widow from marrying than a maid. The authority referred to in the margin in support of this view, *Godolphin's Orphan's Legacy*, puts the case very differently, and does not bear out the statement in *Bacon*. The doctrine, therefore, so far rests on *Bacon's Abridgment* alone, a book which, though generally of considerable authority, is not equally so throughout all the articles.

The bulk of the learning on the general subject of conditions in restraint of marriage is contained in the case of *Harvey v. Aston* (a), in the judgments of the Chief Baron *Comyns* and Lord Chief Justice *Willes*, with which Lord *Hardwicke* agreed. The counsel who argued that case evidently felt themselves embarrassed, because the will in question was not a will of personalty. At that time, at any rate, a marked distinction was drawn (and I cannot say even yet that it is altogether overthrown) between the gift of a charge on real estate and the bequest of a legacy out of personal estate. It was a moot question, to what extent the Courts would

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(a) 1 Atk. 361 ; Com. R. 726.

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follow the rules of the canon law in cases of realty, however much they might be disposed to do so in respect of personal estate, for the purpose of preserving uniformity of decision. Even as regards personalty, the strict rule of the canon law was not adhered to; and in cases of real estate there was still less reason for regarding it.

What Chief Baron *Comyns* says in his own report of his judgment in *Harvey v. Aston* (a), is, that the principal objection was, that by the civil law a condition not to marry without consent was void, that the rule was adopted by this Court, and that the civil law made no distinction between conditions precedent and subsequent. Then, after referring to and adopting an observation of *Selden*, to the effect that the common law was not to be changed by the civil law, but that, in the absence of any express rule of the common law, the civil law had been followed, he says that this had been done in regard to the condition of not marrying without consent, annexed to a pecuniary legacy without a gift over; but that the rule was rejected where there was a gift over. Then he goes on to explain the origin of the rule in the Roman law. Thus he says, that two ways were employed for defeating the legitima portio of the heirs, which was payable on marriage, when they went into another family—first by giving it on condition they should not marry; secondly, by preventing their marriage. Both of these were endeavoured to be remedied by the *Lex Julia*, which provided “*Qui cælibatus aut viduitatis conditionem hæredi legatariove injunxerit, hæres legatariusve ea conditione liberi sunt.*” Then he mentions, that the branch of the *Lex Julia* which made void conditions prohibitory of marriage annexed to a legacy referred to total prohibition only, and extended to prohibitions to widows as well as maidens. But he adds, in respect to widows it was soon after dispensed with; and

(a) Com. R. 734.

therefore, that if a man gave a legacy to his wife on condition that if she married it should go to another, *Gaius* pronounced in favour of the validity of the condition. And though such a condition was mentioned as void *si mulieri legatur* (a), yet he says, *Gothofred* in his notes asks *quid si uxori?* and answers, *si nupserit cogenda est*. That bears on the argument, that, when a widow is thus spoken of, the donor's own widow is always meant. C. B. *Comyns* then refers to the *Novels*, lib. 22, cc. 43, 44, to show that the law was abrogated in respect of legacies to a wife. There the *Lex Julia Miscella* is referred to, which allowed a woman to marry again and retain her husband's legacy (notwithstanding a prohibition of marriage) on swearing within a year "*quia ex filiorum causa hoc ageret*," an expression which is somewhat ambiguous, and may refer either to existing or future children. The chapter of the *Novels* concludes with some very reasonable observations—"Non enim volumus deficientium nihil illicitum habentes voluntates frustrari. Si enim diceremus oportere mulierem omnino viro præcipiente non nubere hoc custodire; pro amaritudine habuisset hoc merito lex: nunc autem cum secundo præsto sit lex, scilicet ut si voluerit nubere, accipiat quod relictum est: novissimi sceleris est despiciere voluntatem defuncti ita fluctuantem ut ei detur licentia nubendi et accipiendi quod relictum est, et per omnia contristandi priorem maritum."

The good sense of the doctrine is, that the widow has the option either of remaining a widow or giving up the legacy. Then C. B. *Comyns* further refers to the *Orphan's Legacy* (b) where it is said, that although a condition directly contrary to marriage annexed to a legacy in a will is a void condition, yet the civil or rather the canon law doth distinguish in this point between a virgin and a widow, and says that such conditions against marriage (as

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(a) Dig. l. 35, tit. 1, l. 22.

(b) Part 3, c. 17, sect. 9.

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to a virgin) are void, but allows them as to widows, specially if the legacy be given by a husband to his own wife or by a son to his mother. That observation, therefore, does not apply exclusively to the case of a man's own widow, because it includes also legacies by a son to his mother; though I am not aware of any other authority for a special exception in the latter case.

In *Lowe v. Peers*, the question arose upon a bond conditioned for payment of £1000 on the obligor marrying any one except the obligee. This was held void, the restraint there being on the marriage of a man.

Baker v. White is not so strong. That was a case of mutual bonds between a man and a widow for payment of penalties by whichever should marry again, and the bonds were cancelled. That was a mere wager; but, looking at the report in *Vernon*, it does not appear very clearly what were the precise grounds of decision, whether the principle of public policy or the fraudulent character of the transaction. But in *Lowe v. Peers*, Lord *Mansfield* and Mr. J. *Aston*, commenting on *Baker v. White*, refer to the circumstance that the marriage sought to be restrained was that of a widow; and Lord *Mansfield* observes "there is a difference between a restraint of a first marriage, and the restraint of a second marriage;" and Mr. J. *Aston* says, that the restraint of a first marriage is contrary to the policy of the law, the public good, and the interests of society; though the frequent customs of copyholds intimate that the restraint of a second is not so. I find, therefore, both these Judges drawing a distinction between restraints on first and second marriages, and one of them assigning reasons for it. Lord *Cranworth*, however, in *Lloyd v. Lloyd*, puts the doctrine principally on the sort of interest which the husband is supposed to have in his wife's widowhood. But there is no reason why a testator should compel

his own widow to abide by a condition contrary to the policy of the law, which he could not enforce upon a stranger. If the policy of the law is, that all people, whether widows or single persons, should marry, that is as much defeated by a condition against marriage imposed by a husband on his own wife as in any other case. If the question, therefore, turns on any such broad principle of public policy as this, I do not see how it can be said that such policy does not apply to a man's own widow. The common law seems always to have allowed certain restraints of an analogous character in respect of widows, and to have admitted distinctions between the cases of widows and spinsters.

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I come now to *Scott v. Tyler*, in which an elaborate judgment was given by Lord *Thurlow*, which is reported in 2 Dick. 712. In the course of this Lord *Thurlow* says, that by the canon law all conditions in restraint of marriage are void. Then he explains how the doctrine arose that devises of land should follow the common law, and legacies of money should follow the canon law. Then he says, that the canon law may be explained by the civil law, and quotes the *Lex Julia*, pointing out that on the principle of preventing evasion all distinction was abolished between conditions precedent and subsequent; and adds, that on the other hand the ancient rule of the civil law has suffered much limitation in descending to us, and that the case of widowhood was altogether excepted by the Novels, injunctions to keep that state having been made lawful. That certainly refers to the case of a gift by the husband to his own widow, though the policy on which the law was founded admits of a much wider application.

In *Stackpole v. Beaumont* (a) Lord *Loughborough* makes these strong observations—"How it should ever have come

(a) 3 Ves. 89.

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to be a rule of decision in the Ecclesiastical Court is impossible to be accounted for but upon this circumstance, that, in the unenlightened ages, soon after the revival of letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned, but only looked into the books, and transferred the rule, without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except for that circumstance, how in a Christian country they should have adopted the rule of the Roman law with regard to conditions as to marriage. First, where there is an absolute unlimited liberty of divorce all rules as to marriage are inapplicable to a system of religion and law where divorce is not permitted. Next, the favour to marriage and the objection to the restraint of it was a mere political regulation, applicable to the circumstances of the Roman empire at that time, and inapplicable to other countries. After the civil war the depopulation occasioned by it led to habits of celibacy." And then he goes on to refer to the Julian law, and the Lex Papia Poppæa, by which heavy impositions were laid on celibacy; and it is to be observed, that Lord *Loughborough* does not say a word to depreciate the value of the civil law generally, though he points out the inapplicability to a Christian country of those particular provisions against restraints on marriage.

However, the law must be taken to be settled as to males and unmarried women that you cannot impose on them a condition in restraint of marriage, such as occurs in the will before me. What I am now asked to do is, to extend this rule for the first time to a restraint on the marriage of a widow. There is no authority for doing so, and the dicta upon the whole are rather the other way. I have mentioned *Godolphin*, and I might also have referred to a case cited by Mr. *Barber of Morley v. Rennoldson*, where V. C. *Wigram* speaks of widowhood generally as constituting the

exception to the rule. This of course is open to the suggestion made with reference to other observations of the same kind, that it must be considered as pointed at the case of a gift to the donor's widow, and also to the observation that it was extra-judicial. But the Vice-Chancellor was extremely careful in the statement of the general doctrines which he laid down, and he certainly does not mention any such limitation as is suggested.

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For myself, I cannot see why a husband should be allowed to impose a condition contrary to the general policy of the law, unless you put it as Lord *Cranworth* did, on the ground that the husband is supposed to have an interest in his wife remaining a widow, and that this consideration is sufficient to counteract the general policy of the law. The only solid foundation that I can discover for any such supposed interest rests upon the interests of the children; and in the case now before me this applies much in the same way as in the case of a husband providing for his wife and family. The property here is given by a will curiously framed, for the purpose of providing for the widow and family of a deceased nephew. The testator puts himself as it were in loco parentis to the children, and not knowing what course a step-father might take, he directs that the mother's interest shall cease on her second marriage; and indeed, in such a case as the second marriage of a mother who has been appointed guardian of her infant children, this Court attaches so much weight to the circumstance, that it requires a new appointment to be made.

It seems to me, that the real principle in the case of a gift by a husband is, that the condition is not regarded as an arbitrary prohibition of marriage altogether, but the conditional gift is considered as made to the widow because she is a widow, and because the circumstances would be entirely changed if she entered into a new relation. The very same consideration applies to this gift; and I think

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—
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it would be reasonable on a will of this kind to hold that the case falls within the principle which governs a gift to a man's own widow. But I prefer to rest my decision on what is perhaps the safer as well as the broader ground, namely, that there is no authority in the common law, independently of the civil law, for saying that a condition restraining the marriage of a widow is void; and having regard to the observations of Lord *Loughborough*, I do not hesitate to say, that I shall not introduce any new doctrine to carry the rule of avoiding restraints on marriage beyond the limits of the old authorities. As an instance of the way in which the old common law dealt with this subject, I may refer to the Year Book of the 43rd of Ed. 3, Hil. Term, 13, where I find a case of replevin, in which the distress was justified, because it was alleged that by the custom of the manor any person who married himself, or made his son or daughter marry, without licence of the lord, was liable to a fine. The judges, whether rightly or wrongly, treated the case in this singular way: they said it was a condition to which no freeman could be subjected, though it might be good as to villeins, because the lord might do as he pleased with a villein.

I see no objection on principle to the condition, bearing in mind that the widow has always the option of marrying again and giving up the bounty. With respect to the authorities none can be found in which it has been held that such a condition is void in the case of a widow, and I am not disposed to make the first precedent for such a doctrine. The answer to the case will therefore be, that the trusts in favour of the widow, both of the rents and the annuities, ceased on her second marriage.

SLADEN v. SLADEN.

JOSEPH SLADEN, by his will dated the 14th of October, 1822, after other devises in strict settlement of property not in the county of *Kent*, made the following devise of certain freehold and leasehold houses in *Folkestone*, in the county of *Kent*: "To my daughter *Mary Sladen*, and her assigns, for and during the term of her natural life," and after her decease "unto all the child and children, both male and female, of my said daughter *Mary Sladen*, lawfully begotten, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants, and the heirs of their respective bodies issuing; and in case any of them shall happen to die without issue, then as to the part or share or parts or shares of such child or children so dying, or whose issue shall fail, to the use of the survivors or survivor and others and other of them, and the heirs of their respective bodies; and if there shall be failure of issue of all the said children but one, or if there shall be but one child, then to the use of such remaining or only child, and the heirs of his or her body issuing; and for default of such issue to the use of my own right heirs for ever."

The will also contained the following gift:—"I give and devise" my leasehold tenement in the parish of *Chartham* in the county of *Kent* "unto my son in law *William Smith*, and my said daughter *Caroline Matilda* his wife, for and during the term of their natural lives, if my estate and interest therein shall so long continue." . . . "And from and after the decease of the survivor of them the said *W. Smith* and *Caroline Matilda* his wife, I give and devise the said leasehold tenement unto the first son of the body of my said daughter *Caroline Matilda* already begotten or to be begotten, and the heirs male of the body

1868.

June 3rd.

Will—Construction—
Gavelkind—
Heirs.

Devise of freehold and leasehold lands in *Kent*, in strict settlement, with an ultimate limitation to testator's own right heirs, the will also containing a similar disposition of other leaseholds in *Kent* not the subject of the suit:—
Held, that the common law heir was entitled.

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 —
Statement.

of such first son lawfully issuing, for and during all the then residue and remainder of my estate and interest therein. And for default of such issue then I give and devise the same leasehold premises unto the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and all and every other son and sons of the body of my said daughter *Caroline Matilda*, severally, successively, one after another, as they and every of them shall happen to be in priority of birth and seniority of age, and the several and respective heirs male of the body and bodies of all and every such respective son and sons lawfully issuing, the elder of such sons and the heirs male of his body being always preferred and to take before the younger of such sons and the heirs male of his or their respective body or bodies issuing, for and during all the then residue and remainder of my estate and interest therein. And for default of such issue, then I give and devise the same leasehold premises unto and amongst all and every the daughter and daughters of my said daughter *Caroline Matilda* already begotten or to be begotten, for and during all the then residue and remainder of my estate and interest therein. And for default of such issue, then I give and devise the same leasehold premises unto the right heirs of me *Joseph Sladen*, for and during all the then residue and remainder of my estate and interest therein."

The testator died in 1827 leaving *Joseph Sladen* his eldest son and heir at law, and the said *Joseph Sladen* and *John Baker Sladen* his gavelkind heirs.

The said *Mary Sladen* died in 1861 without having had issue.

Joseph Sladen, the son, died in 1855, having bequeathed his residuary personal estate to the Plaintiffs, but intestate as to the freehold house in *Folkestone*. The Plaintiffs were his heirs in gavelkind.

John Baker Sladen died in 1860, having devised and bequeathed all his real and personal estate to the Defendants, who were also his executors.

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Statement.

The bill prayed a declaration that the Plaintiffs as residuary legatees and gavelkind heirs of *Joseph Sladen* the son, were entitled to the said freehold and leasehold houses in *Folkestone*.

Mr. *Hobhouse*, and Mr. *Sladen*, for the Plaintiffs:—

Argument.

The words 'right heirs' in the ultimate gift of the *Folkestone* houses must, as matter of construction, be read heirs at law.

The grand scheme of the will is to limit the property, whether in or out of *Kent*, in strict settlement, showing no regard for the principle of gavelkind; and the word 'heirs' must, therefore, bear its ordinary meaning.

The leasehold also goes to the heir. It would be so if the subject of the gift were money: *De Beauvoir v. De Beauvoir* (a); and a fortiori, where there is a common gift of leaseholds and freeholds together. The term 'right heirs' is a mere designatio personæ, and must have its ordinary meaning: *Counden v. Clerke* (b). *Roberts v. Dixwell* (c) went upon the fact that socage and gavelkind lands were intermixed. So here there are leaseholds and freeholds intermixed. *Thorp v. Owen* (d) is also in point.

[They also cited *Robinson on Gavelkind* (e), and *Co. Litt.* 10. a, 22. b.]

Mr. *C. Hall* and Mr. *Casson*, for the Defendants:—

As to the leaseholds, there was a joint tenancy, and we

(a) 15 Sim. 163.

(c) 1 Atk. 607.

(b) Hobart, 29.

(d) 2 Sm. & G. 90.

(e) 3rd Ed. p. 156.

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take by survivorship. As to the freehold, we are entitled to a moiety under the will of *J. B. Sladen*. Under the old law, before 3 & 4 Will. 4, c. 106 (1833), the heir took by descent; and therefore, this being a devise of gavelkind land to the testator's right heirs, the heirs in gavelkind take by descent. All the authorities on the other side relate to the heirs, not of the testator, but of a stranger.

[They cited *Buchanan v. Harrison* (a), *Davis v. Kirk* (b), *Crump v. Norwood* (c), *Gwynne v. Muddock* (d).]

Mr. *Hobhouse* in reply.—The old rule as to the heir taking by descent is a rule of law, which cannot be applied until the construction is first ascertained. To rely on this is to beg the question whether the persons meant are or are not the gavelkind heirs, who would be entitled by descent. The very same phraseology is used in the gift of the *Chartham* leasehold, where the testator is not dealing with descendible property at all. There can be no doubt there that the heir-at-law is designated, and the same construction must be adhered to throughout the will. *Buchanan v. Harrison* only decides, that, where a legal interest is given to the heir as trustee, the equitable interest descends, if not given away; and *Davis v. Kirk* turned on the fact that the descent was broken by the devise. *Crump v. Norwood* does not decide the point at all. It was assumed that the estate vested in the same person whether as heir-at-law or as heir in gavelkind. *Gibbs*, C. J., expressly guards himself against deciding this question. The presumption is, that when a testator speaks of his own right heirs, he means to point to his heir-at-law, though it may be otherwise when the word is used with reference to the measure of an estate in land. The rule of law relied on, therefore, has no application.

(a) 1 Jo. & H. 662.

(b) 2 K. & J. 391.

(c) 7 Taunt. 362.

(d) 14 Ves. 488.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think, that, considering the manner in which the testator has mixed the freehold and leasehold estates, he must be taken to have meant by the ultimate gift to designate his heir-at-law. In the absence of any such circumstance I should be inclined to hold that the gavelkind heirs would be entitled. The question is one wholly of intention; and I do not see how any intention can be presumed, except to point to the heir-at-law. He must have intended something to pass by the will, and not merely that the old use should remain. That is obvious from the leasehold and freehold property having been mixed together. This view is corroborated by the circumstance, that, in disposing of the *Chartham* leaseholds by themselves the testator limits them ultimately in the same way to his own right heirs, showing that in using this phrase he was minded to dispose of this property, and not merely to allow it to descend. Unless I give this effect to the words 'right heirs' throughout, I must hold that the testator meant to die intestate as to one subject, and to pass the other by the very same words. I think, therefore, that the way in which the leasehold and freehold property is mixed together, gives to the words an interpretation, which, if it had been a simple devise of freeholds in gavelkind, they might not perhaps have borne, though as to this point I do not express any opinion.

There will be a declaration, that, according to the true construction of the will, the leasehold and freehold property in *Folkestone* passed to *Joseph Sladen* the son, as testator's heir-at-law.

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Judgment.

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Feb. 27th.

*Bankrupt—
Bankruptcy
Consolidation
Act (12 & 13
Vict. c. 106),
Order and Dis-
position—
Order for Sale
—Jurisdiction.*

The order by the Court of Bankruptcy for sale of goods as in the reputed ownership of a bankrupt is *ex parte*; and, *semble*, it cannot be appealed against by the true owner.

The Court of Chancery has jurisdiction (notwithstanding such order) to restrain a sale and determine the rights of the parties.

An application by the true owner to the Court of Bankruptcy for a stay of proceedings *held* not to be a bar to a subsequent bill for injunction to stay a sale.

MATHER v. LAY.

THIS was a bill filed by *Jane Simmons*, a married woman, and the trustee of her marriage settlement dated the 19th of April, 1859; the first limitation of which was a life estate for the separate use of the wife, followed by a power of sale to be exercised at the request of the wife, and the proceeds to be paid to her on her receipt. The Defendant was the assignee of the husband, who became bankrupt on the 12th of November, 1861.

The bill alleged, that before the bankruptcy the trustee, out of the proceeds of a sale of the trust property, purchased certain furniture partly from tradesmen and partly at a sale under an execution levied against the husband. The Defendant alleged that the money had been given by the wife to her husband, and the furniture bought by him. This furniture was used in a lodging-house inhabited by *Mrs. Simmons* and her husband, the business being carried on, according to the Plaintiff's allegation, by the wife with her separate property, but, as the Defendant alleged, by the husband.

The Defendant *Lay* claimed the furniture as in the order and disposition of the bankrupt; and on the 4th of February, 1862, an order of the Court of Bankruptcy was obtained by him, directing that the furniture should be sold for the benefit of the estate.

It appeared in evidence that the Plaintiff had applied to the Court of Bankruptcy for a stay of proceedings, but had not otherwise submitted to the jurisdiction. The bill alleged, that *Lay* was the only creditor who had proved, that he knew the circumstances under which the furniture was bought by the trustee, and that no other creditor had given credit to the bankrupt on the faith of his alleged possession of these goods.

The prayer of the bill was for an injunction to restrain the sale of the furniture by *Lay*, and for declarations establishing the claims of the Plaintiffs under the marriage settlement. There was considerable conflict of evidence on several points, but the material question was as to the effect of the order of the Court of Bankruptcy.

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Statement.

Mr. *Rolt*, Q. C., and Mr. *Marten*, for the Plaintiffs, moved for an injunction according to the prayer:—The order of the Court of Bankruptcy for the sale of goods claimed by the assignee as in the bankrupt's order and disposition is *ex parte*, and cannot alter the rights of the true owners. Every question of this kind is left open, and this Court has jurisdiction, notwithstanding the order, to protect the property pending the question of right: *Ex parte Lucas* (a), *Ex parte Wood* (b).

Argument.

Sir *H. Cairns*, Q. C., and Mr. *W. H. Terrell*, for the Defendant:—

The order of the Court of Bankruptcy not having been appealed against is conclusive. It could only be questioned by proceedings in Bankruptcy, and this Court has no jurisdiction to restrain a sale. The Plaintiffs have submitted to the Bankruptcy jurisdiction by applying for a stay of proceedings, and could only have relief by appeal; 12 & 13 Vict. c. 106, s. 12.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I have no doubt as to the jurisdiction. The Commissioner in Bankruptcy has made an order for sale, because such an order is necessary in every case to enable the

Judgment.

(a) 3 D. G. & J. 113.

(b) 4 D. G. M. & G. 861.

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assignee to assert his claim to property as in the reputed ownership of the bankrupt. I think it clear that the order could not be discharged on appeal, and that it was properly made on an ex parte application. There may be some question whether it would not be competent for the true owner to make an application to the Lords Justices to stay the execution of such an order. But it is clear, that by that order nothing was done to conclude the rights of these Plaintiffs whatever they may be, and at the proper time this Court is bound to determine them.

His Honour, after discussing the evidence on the matter in dispute, made an order for an injunction.

June 14th,
 16th, & 26th.
*Joint Stock
 Company—
 Winding-up—
 Stannaries—
 Statutes—*
 12 & 13 Vict.
 c. 108—18 & 19
 Vict. c. 32—20
 & 21 Vict. c. 78.
 The proviso
 contained in the
 Winding-up
 Amendment
 Act, 1849, re-
 quiring the pe-
 titioners (in the
 case of cost-
 book mines
 within the jur-
 isdiction of the

RE SOUTH LADY BERTHA MINING COMPANY.

THIS was a petition to wind up the *South Lady Bertha Mining Company*. The company was formed subsequently to the Joint Stock Companies Winding-up Amendment Act, 1857, for the purpose of working mines in *Devon* under the cost-book principle. The petition was presented by persons who had once held shares to the extent of more than one-tenth of the whole amount; but, before the presentation of the petition, the petitioners had relinquished a large number of shares, and were not owners of one-tenth in *Cornwall* to be owners of one-tenth of the shares, is not extended to mines in *Devon* by the 18 & 19 Vict. c. 12, which brought that county within the Stannary jurisdiction. *Semble*, also, the said proviso is not repealed by the 20 & 21 Vict. c. 78, s. 12, which requires the leave of the Court of Chancery or the certificate of the Vice-Warden to a petition to wind up in Chancery a mine subject to the Stannary jurisdiction.

Principles on which a statute may operate as an implied repeal of a previous statute considered.

The leave of the Court required by 20 & 21 Vict. c. 78, s. 12, may be granted on the ground that the Stannaries Court has no jurisdiction to stay proceedings by creditors against individual shareholders.

It is not necessary that the fact of such leave having been obtained should be stated on the petition, or that notice thereof should be given to the respondents.

value of the whole. By the cost-book rules the relinquishment relieved them from future but not from past liabilities in respect of those shares, and they had been sued in respect of debts contracted by the company before the relinquishment.

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 ———
 Statement.

It appeared that the company was utterly insolvent, and that the purser had contracted debts for which the shareholders were liable, and had misapplied the assets of the company; and it was not disputed that if the Court had jurisdiction, and the proceedings were regular, it was a proper case for a winding-up order.

An *ex parte* application had been made on the 3rd of April, 1862, under the Joint Stock Companies Winding-up Amendment Act, 1857, for leave to present the petition; and leave had been granted, mainly on the allegation that the Stannaries Court had no jurisdiction to restrain creditors from proceeding against individual contributories; but no statement was introduced into the present petition, nor was any notice given to the respondent, that the petition was presented pursuant to the leave of the Court.

Mr. *Roxburgh* and Mr. *Lovell* appeared for the petitioners.

Argument.

Mr. *Jessell*, for the purser, took a preliminary objection, that it did not appear by the petition that leave had been given.

The VICE-CHANCELLOR referred to his notes, and found that he had granted leave.

Mr. *Jessell*.—In all cases where proceedings are taken, whether by notice of motion or by petition under the special leave of the Court obtained *ex parte*, it is essential, according to the practice, that that fact should be stated:

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otherwise, a respondent is entitled to treat the proceeding as a nullity.

The VICE-CHANCELLOR said, that the only question was, whether the leave had been given, and in this case he found that it had; but it would be open to the respondent in opposing the petition to argue that the leave was granted on grounds not authorised by the Act.

Mr. *Roxburgh* and Mr. *Lovell*.—The substantial question of law which arises here is, whether this Company is within the provision contained in the Winding-up Amendment Act, 1849 (12 & 13 Vict. c. 108, s. 1), which requires that the petitioners shall be owners of at least one-tenth of the shares (a). That section

(a) The clauses on which the argument mainly turned are as follows:—

12 & 13 Vict. c. 108, s. 1, after enacting, That, notwithstanding anything in the Joint Stock Companies Winding-up Act, 1848, contained, importing a more limited application thereof, the same shall extend to all partnerships, associations, and companies therein described, proceeds as follows:—"Provided nevertheless that nothing herein contained shall affect the jurisdiction of the Court of Stannaries in Cornwall, and that nothing in this Act nor in any Act herein referred to contained shall extend or be construed to extend to any partnership, association, or company formed for the working of mines on the principle commonly called the cost-book principle within the said Stannaries and jurisdiction of the said court, unless the owner or owners of one-tenth in

value of the shares in any such mine as shall appear on the cost-book shall present a petition to the Lord Chancellor or to the Master of the Rolls for the dissolution and winding-up, or for the winding-up of the affairs of such company, which petition and the parties thereto, and all proceedings thereupon shall be subject to the provisions of this Act and the Act herein referred to; and that on such petition being so presented and notice thereof being given to the Vice-Warden by the party petitioning, the court of the said Vice-Warden and the Registrar and officers thereof shall cease from entertaining and dealing with any cause touching such mine, except so far as may be allowed and directed by order of the Court of Chancery in regard to any cause then or to be thereafter brought in the court of the said Vice-Warden, or in regard to

enacts that the winding-up jurisdiction of this Court shall not extend to mines on the cost-book principle within the jurisdiction of the Court of Stannaries in

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—
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any proceedings to be taken in furtherance of the said petition and the purposes of this Act and the Acts herein referred to, and that the said Vice-Warden and Registrar in taking such proceedings shall have all the powers which any district commissioner of the Court of Bankruptcy now has in any matter which, by virtue of this Act and the Acts herein referred to, may be brought before him."

18 & 19 Vict. c. 32, s. 32.
"And whereas it has been represented that the adventurers, miners, and others interested in mines in the county of *Devon* would be benefited by the extension of the Stannary Court jurisdiction into that county, and are willing to be contributory to the expenses of such extension in the manner hereinafter provided: Be it therefore enacted as follows: The jurisdiction of the court of the Vice-Warden shall henceforth be extended and exercised over the county of *Devon*, and over the mines and miners therein, and the process of the said court both at common law and in equity shall run in and be executory throughout the counties of *Devon* and *Cornwall*, and the forms and customs of procedure as now lawfully used and exercised in the Stannaries of *Cornwall* (subject, nevertheless, to such amendments or provisions as are contained in or may be

authorised by this Act, and to all other lawful rules and orders of the Court) shall henceforth be adopted, used, and enforced in and throughout the Stannaries and county of *Devon*; and the Stannaries of the said two counties shall be and become, for the purposes of Stannary jurisdiction, one entire district, and the present and all future Vice-Wardens of the Stannaries shall be Vice-Wardens of the Stannaries of and for both counties, and shall have therein all the like powers, privileges, authorities, and jurisdiction over and in respect of mines and miners and causes touching the same in *Devon* as in *Cornwall*; and all miners and others interested in mines in *Devon* shall have the privilege to sue and to be sued at law and in equity in the court of the Vice-Warden, and be amenable to the said court and Vice-Warden, as well by reason of the person as of the cause, in like cases and for like causes in and for which the miners and others interested in mines in *Cornwall* now have such privilege or are amenable to the said court and Vice-Warden: Provided always that the common law jurisdiction of the Vice-Warden in respect of causes of action arising in *Devon* shall not extend to or be exercised in the county of *Devon*, or to or over miners therein, except in causes

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 ———
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Cornwall, unless on the petition of the owners of at least one-tenth of the shares.

At that time there was no Stannaries jurisdiction except in *Cornwall*.

In the year 1855 an Act was passed (*a*), for extending the Stannaries jurisdiction, and it was thereby (*b*) extended to the county of *Devon*, and various additional powers were given to the Court. As a temporary arrangement it was provided, that the *Devon* jurisdiction should be exercised by the Vice-Warden of the Stannaries sitting in *Cornwall*; but the *Devon* and the *Cornwall* Stannaries were intended ultimately to be separate jurisdictions (*c*), though at first to be exercised by the same tribunal.

[There was some discussion as to the meaning of the term Stannaries, and it was conceded that originally the Stannaries were districts paying royalty on tin to the Prince of *Wales*, that the jurisdiction of the Vice-Warden

and in respect of matters relating to mines or the products thereof, or work connected therewith, or to the working or management thereof, or the supply of materials, money, or necessities, or performance of work and labour to, for, or in respect of such mines or works, or relating to the customs of mining or miners, or to shares or interests in any mine or adventure in mines."

20 & 21 Vict. c. 78, s. 12:—
 "And whereas the dissolution and winding-up of unincorporated companies for working mines within and subject to the jurisdiction of the Stannaries can now in most cases be conveniently, cheaply, and expeditiously effected in the Court of the Vice-Warden of the Stan-

naries: Be it enacted, that no petition shall hereafter be filed in the Court of Chancery under the Joint Stock Companies Winding-up Acts, 1848, 1849, by any adventurer or shareholder in such a company, except upon special application to that Court, alleging and showing to the satisfaction of the Court that the company cannot be effectually dissolved or wound up in the court of the Vice-Warden, or unless the Vice-Warden shall certify to the Court of Chancery that the jurisdiction and powers of his court are, under the circumstances, insufficient effectually to dissolve or wind up the same."

(*a*) 18 & 19 Vict. c. 32.

(*b*) Sects. 32, 33.

(*c*) Sect. 38.

was limited to tin mines, but was afterwards extended to other metals; that there always were Stannaries in *Devon* as well as *Cornwall*, though before the Act of 1855 there was no Court of Stannaries except the Court in *Cornwall*, with a jurisdiction limited to that county.]

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The next Act which affects the question is the Joint Stock Companies Winding-up Act, 1857 (a). The 12th section of that statute enacts, that no petition shall be filed in the Court of Chancery for winding-up a company within the Stannaries jurisdiction, except on special application to that Court, showing that the Company cannot be effectually dissolved or wound up in the court of the Vice-Warden, or unless the Vice-Warden shall certify that his jurisdiction and powers are, under the circumstances, insufficient effectually to dissolve or wind up the same.

The true view of this last Act probably is, that the provision requiring the special leave of the Court is a substitute for the earlier provision requiring (in the case of *Cornwall*) that one-tenth of the shares shall be owned by the petitioners; so that the 1st section of the Act of 1849 is in effect repealed in this respect, even as regards mines in *Cornwall*. But it is not necessary in this case to carry the argument as high as that. Assuming that the old proviso is still in force as to *Cornwall*, it never was in force as to *Devon*. From 1849 to 1855 this was clearly so, for there was no Stannaries Court except in *Cornwall*. Then the Act of 1855, which extended the jurisdiction to *Devon*, cannot be taken to extend the restriction on the jurisdiction of this Court beyond its original limits. The principle of construction of Acts of Parliament is to read the words with reference to the state of the law as it existed at the time: *Re British Provident Society* (b); and it is not admissible to import into the Act of 1849 an interpretation

(a) 20 & 21 Vict. c. 78.

(b) 10 W. R. 308.

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 —
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of the term Court of Stannaries which was given to it for the first time by the Act of 1855. The clause, therefore, has no operation with respect to mines in *Devon*, and is no obstacle to our petition, even though the fact were (which we dispute) that one-tenth of the shares are not owned by the petitioners. Whatever question there may be as to the extent of the shares owned by the petitioners, there is no dispute that they are liable as former owners and actual contributories in respect of more than that proportion, and they have, in fact, been sued in respect of such liability. When the Act speaks of owners of shares, this must include all contributories (*Times Fire Assurance Company (a)*), otherwise the present owners might deprive the great mass of the contributories of all protection from the claims of creditors. There can be no effectual winding up in the Stannaries for want of the power to restrain actions.

Mr. *Jessell*, for the pursuer :—

1. This is not a case in which leave to present a petition could be properly given. The ground of the application was not one contemplated by the Act of 1857. The 12th section of that statute is clearly not meant to give any new power to the Court of Chancery. It is a disabling clause, and its operation can only be prevented by showing that the company cannot be effectually wound up in the Stannaries Court. It is not enough to say that it can be more advantageously wound up here; but what is pointed at is the existence of some special circumstances to take the particular case out of the general rule that mines within the Stannaries (and this Act applies equally to *Devon* and *Cornwall*) shall be wound up in the local court.

The only ground alleged is, that the petitioners cannot obtain adequate redress by reason that the Stannaries Court does not possess jurisdiction to stay proceedings by creditors.

If this is a sufficient ground it must apply in every case of a mine within the Stannaries, and the clause would amount to this: the Court of Chancery shall not have jurisdiction except under circumstances which must occur in every case. On this view the leave can never be refused, and the clause becomes an absolute nullity. The meaning of the phrase "cannot be effectually dissolved or wound up" cannot, therefore, be that which the petitioners put upon it. Their argument is, that no company can be effectually wound up in the local court: and, besides the reason I have given, there is this further answer, that the Legislature has expressly recited in this very clause that companies can, in most cases, be conveniently, cheaply, and expeditiously wound up in the local court. Moreover, the Court of Chancery did effectually wind up companies under the Acts of 1848 and 1849, for eight or nine years, without the power of restraining creditors, which is said to be essential, and which was only granted by this same Act of 1857. Besides, if this power were so essential, the Legislature, when enlarging the Stannaries jurisdiction with a view to bring these proceedings within it, would certainly have granted the necessary power.

Thus far I have, for the sake of argument, assumed that the Stannaries Court has not the power of restraining creditors; but I do not admit this. It is clear, under the 1st section of the Act of 1857, that any judge who can wind up a company would have this power. The word 'judge' includes the Vice-Warden of the Stannaries, as appears by the subsequent part of the Act. It is true that the word 'court' is interpreted in the Acts of 1848 and 1849 to mean the Court of Chancery, and that the Act of 1857 is to be read as part of these Acts; but this must be where it is not inconsistent with them. Now, on this point, it is inconsistent; and, therefore, the Stannaries Court has the power which is given generally to all judges in winding-up proceedings.

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2. It is essential that the petitioners should be owners of one-tenth of the shares.

The proviso of the Act of 1849 was intended to preserve to the miners in the Stannaries the privilege of their own domestic forum in all cases, except where a certain proportion preferred to resort to this Court.

The previous Act of 6 & 7 Will. 4, c. 106, had improved and extended the Stannaries jurisdiction, and in 1855 further improvements were introduced by the 18 & 19 Vict. c. 32, and all the privileges enjoyed by *Cornwall*, which included, among others, the privilege of retaining the local jurisdiction in winding-up cases, were extended to the county of *Devon*.

The recital in the 32nd section is, that it had been represented that miners in *Devon* would be benefited by the extension of the Stannary Court jurisdiction into that county, and then it is enacted, that the jurisdiction of the Vice-Warden's Court shall be extended over the county of *Devon*, and that the Stannaries of the two counties shall, for purposes of Stannary jurisdiction, become one entire district, and that the Vice-Wardens of the Stannaries shall be Vice-Wardens of the Stannaries of both counties, and shall have all the like powers, privileges, authority, and jurisdiction in *Devon* as in *Cornwall*, and also that all miners and others interested in mines in *Devon* shall have the privilege to sue and be sued in the Stannary Court in like cases as miners in *Cornwall* then had.

Stronger words could not be used to give to *Devon* miners the privilege which *Cornwall* miners already enjoyed of not being taken out of the local court.

[The VICE-CHANCELLOR.—By what Act is the power of winding up given to the Stannaries Court?]

Mr. Jessell.—The 4th section of the 18 & 19 Vict. c. 32, gives powers of proceeding on petition, and the 10th

section also enables the local court to get its process executed by making it a rule of one of the superior Courts at *Westminster*; but these are only improvements in machinery, and the power always existed by means of a suit, and this was extended to *Devon* by this Act of 1855.

Mr. *Roxburgh* replied.

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VICE-CHANCELLOR SIR W. PAGE WOOD :—

June 26th.
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This is a petition for the winding-up of a mining company, presented by several persons, some of whom had ceased to be shareholders in the company. Upon the evidence it is clear that the petitioners are not the owners of one-tenth of the shares in the company. The mine is situated in the county of *Devon*, and the main question is, whether it is competent to persons holding less than one-tenth of the shares in this company to present a petition for a winding-up order.

At the time of the passing of the Winding-up Amendment Act, 1849, in which the restriction as to the possession of one-tenth of the shares is contained, the county of *Devon* was not included within the Stannaries jurisdiction, and this mine would therefore not have been subject to the restriction. The question is, whether subsequent enactments, by which the Stannaries of *Devon* have been brought within the jurisdiction of the Vice-Warden, have had the effect of subjecting mines in *Devon* to the proviso in the Winding-up Act, which originally affected only mines in *Cornwall*.

This proviso is contained in the 1st clause of the Winding-up Act of 1849, which enacts that nothing therein contained shall affect the jurisdiction of the Court of Stannaries in *Cornwall*, or extend to any company for working mines on the cost-book principle within the said Stannaries

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and jurisdiction of the said court, unless the owners of one-tenth in value of the shares in any such mine as shall appear on the cost-book shall present a petition for winding up the company.

This does not apply to mines in *Devon*, the exemption being expressly confined to cases within the jurisdiction of the court in *Cornwall* and within the Stannaries in *Cornwall*. From 1849, therefore, to 1855 (when the Stannaries Jurisdiction Act was passed) any company for working mines in *Devon* might have been wound up in the ordinary way.

Mr. *Roxburgh*, in his argument, put the case as high as this—that the condition of obtaining the previous leave of the Court, which was for the first time imposed by the Joint Stock Companies Winding-up Amendment Act, 1857, had superseded, and by implication repealed, even as to mines within the Stannaries of *Cornwall*, the old proviso, which required that the petitioners should be owners of at least one-tenth of the shares. I do not think that construction can possibly be sound, and, indeed, if that kind of argument could prevail, there would be a strong case for holding that the privilege given to *Devon* miners of coming into this Court under the Winding-up Acts of 1848 and 1849 is in like manner repealed by the Stannaries Jurisdiction Act of 1855. I do not think this is so. The principle which determines how far a clause in one Act is to be regarded as repealing, by implication, an earlier enactment, is very distinctly laid down in *Lang v. Spicer* (a). There it is said, that affirmative words cannot repeal a former enactment on the same subject, unless there is a manifest inconsistency between the two provisions. In that particular case it was held, that there was such inconsistency, and that the earlier clause was, by implication, repealed. But in this case I find in the 18 & 19 Vict. c. 32, a distinct reference to and pre-

(a) 1 M. & W. 129.

servation of the 1st clause of the Act of 1849 ; for express power is given to the Vice-Warden, under certain circumstances, to declare a company not to be within the exemption contained in the Winding-up Act, 1849. That power is given by the 22nd section, which enacts, that in case of non-production of the list of shareholders the Vice-Warden may, at his discretion, declare the company not to be carried on upon the cost-book principle, and then the company shall no longer be deemed to be within the conditional exemption contained in the 1st clause of the Act of 1849. So far, therefore, we have the existence of this clause recognised, and nothing to say that the privileges which it gave to *Devon* miners in common with all other shareholders are intended to be repealed, any more than the restrictions imposed on miners in *Cornwall*.

I come now to the important clause which places the Stannaries of *Devon* and *Cornwall* under the common jurisdiction of the Vice-Warden. This is sect. 32.

[His Honour read the section.]

This clause, it is said, repeals in effect the clause in the Act of 1849, which allowed miners in *Devon* to resort to this Court, and which still allows them to do so, unless the privilege is taken away, and the old clause pro tanto repealed by the affirmative section, which I have read.

There can be no such repeal unless the two clauses are inconsistent. The case of *Long v. Spicer* is the most favourable authority I am aware of for the contention, that, by the operation of this clause, *Devon* is brought within the restriction which did not originally apply to that county. The statutes under consideration in *Long v. Spicer* were filiation Acts. The later Act was held to operate as a repeal of the earlier enactment, on the ground of the extreme improbability that the Legislature would provide a double maintenance. That is as strong an authority as any I know for giving a repealing effect to the clause in question here.

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But before adopting this conclusion I must consider who are the persons interested. If only the existing body of miners were affected by the enactment there might be some ground for arguing that two jurisdictions would not be provided for the same subject-matter; and that, when the jurisdiction of the Vice-Warden was extended to *Devon*, the jurisdiction of this Court was impliedly taken away, to the extent to which it was already taken away with respect to *Cornwall*. But it must be observed, that, under the Winding-up Acts, any person who is liable to the debts of the company may be proceeded against as a contributory, whether he be an actual or only a late shareholder. On the cost-book principle, a person who transfers his shares becomes exempt from liability for future debts, but he remains liable—and this case affords an example of the rule—in respect of debts contracted by the company before the transfer. Persons in this position, therefore, might be utterly debarred of the relief they could now otherwise obtain against the proceedings of creditors, if it were competent for the present shareholders to prevent an application to this Court unless by a certain proportion in value of their own body. The answer of the contributories to this contention is, "We have remedies in the Court of Chancery, which were granted by the Act of 1849 to miners in *Devon* and everywhere except in *Cornwall*, and these cannot be taken away by another affirmative Act giving to *Devon* miners certain privileges of local jurisdiction which had previously been confined to *Cornwall*."

I think it would be a very strong interpretation of the clause in the Act of 1855 to say, that it is to apply to contributories who may be sued by creditors in the superior Courts so as to leave them entirely remediless, notwithstanding that a remedy has been given to such persons whether in *Devon* or elsewhere (except in *Cornwall*) by means of a winding-up petition in this Court.

As the company was formed when the law was in the same state as at present, there is no room for any plea of hardship, even if any substantial argument could be founded on that ground in any case, which I much doubt. I think, that the proper construction of the Stan-
naries Act is, that it leaves all persons in the possession of the rights which they previously enjoyed, and does not restrict the privilege of resorting to this Court which persons interested in *Devon* mines possessed before that Act was passed.

The other point which was raised turns on the construction of the 12th clause of the Joint Stock Companies Winding-up Amendment Act of 1857.

[His Honour read the clause.]

On this it is contended, that this Court could not grant the required leave on the ground that the local court had no jurisdiction to restrain creditors, because, until the passing of this very Act, the winding-up of companies proceeded effectually in the Court of Chancery, although there was no power even here to restrain a creditors' action. The absence of this power, therefore, in the local court cannot, it is said, be held a sufficient ground for saying that it is unable to give complete relief.

I feel no difficulty as to this. The Legislature by this Act treated the power to stop actions as essential in the conduct of winding-up proceedings, and accordingly conferred it upon the Court of Chancery. The local jurisdiction has not this power; and the absence of it is a proper ground for holding that this Court may therefore assume jurisdiction under the terms of the 12th section.

The facts of the present case afford the strongest possible illustration of the justice of this provision. The purser of the mine seems to have placed the assets of the company to his own banking account, and left the contributories at the

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mercy of the creditors, without having rendered any proper account. He suffered the property of the company to be seized and sold for rent, and in this state of things the contributories have no remedy, unless they are allowed to avail themselves of that which is given by the Winding-up Acts.

Three will be the common order. The point being a proper one to be argued, the costs of all parties served with the petition must be allowed out of the estate.

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June 14th.

*Lands Clauses
Consolidation
Act—Costs—
Mortgage.*

RE LONDON AND SOUTH WESTERN RAILWAY
ACT, 1855.

THIS was a petition for the review of the Taxing-Master's certificate.

A vendor possessed of an estate in fee, of which part was in mortgage, contracted to sell in fee simple to a railway company a portion of the estate. This portion was chiefly free from the mortgage but on investigating the title the Company ascertained that a small part of it was comprised within the mortgage, which was vested in the trustees of a will in course of administration by the

Court. The vendor applied in the suit for and obtained the sanction of the Court to the release of the purchased land from the mortgage:—*Held*, that the Company was bound to pay the costs of the application.

In July, 1858, the petitioner *George Phillips* and his brother were seised in fee simple, as tenants in common, of certain land, part whereof was subject to a mortgage for £7,000. The *London & South-Western Railway Company* served a notice on the petitioner and his brother to take a portion of the land, consisting chiefly of the unincumbered part of the estate, but comprising a small portion of the part which was in mortgage. The petitioner and his brother claimed £25,000. In April, 1859, the entirety of the land became vested in the petitioner on the death of his brother intestate, leaving the petitioner his heir, and an agreement was subsequently come to between the petitioner and the company for the sale of the land in fee simple for £12,800, no mention being made of the mortgage.

From the answers to the requisitions on title, it appeared that a small part of the land contracted to be sold to the company was subject to the mortgage, and the company called for the concurrence of the trustees of the will of the original mortgagee in whom the mortgage was vested. The estate of the mortgagee was at this time being administered in a suit of *Allen v. Embleton*, and an application in that suit became necessary to enable the trustees to join in the conveyance, and release the land taken by the company from the mortgage, and on this application evidence of surveyors and others had to be given.

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The costs of these proceedings were taxed by Taxing-Master *Parkes* at £157 4s. 10d., which was paid by the petitioner, the company not being parties to the suit or to the application.

After various disputes on other points the conveyance was executed, the company entered into possession, and the petitioner's solicitors delivered to the company their bill of costs, charges, and expenses of deducing the title and of the conveyance, including the said sum of £157 4s. 10d. On the 3rd of May, 1861, an order for taxation was obtained by the company at the Rolls, under which Taxing Master *Wainewright*, after referring to *Re South Wales Railway Company* (a), disallowed the said sum of £157 4s. 10d. as not being costs payable by the company under the 82nd section of the Lands Clauses Act. Other items, which it is not material to mention, were also disallowed. This petition was thereupon presented.

Mr. *Giffard*, Q.C., and Mr. *Bury*, for the petitioner.

Mr. *Amphlett*, Q.C., and Mr. *Bagot*, for the Company.

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The following cases were cited:—*Re South Wales Railway Company* (a), *Re Nash* (b), *Re Taylor* (c), *Picard v. Mitchell* (d), *Haynes v. Barton* (e), *Henniker v. Chafy* (f).

Judgment.

The VICE-CHANCELLOR said, that, when the company learned from the answers to the requisitions the existence of the incumbrance on the purchased land and the position of the property, as to which full information was given, they had a right to do one of two things: Either to give notice to the vendors that they must apply to the Court to obtain the release of this land from the mortgage, or else to proceed independently under the mortgagee clauses. A very small part only of the mortgaged portion of the estate was included in the contract with the company, and it would have been unreasonable to expect the petitioner to pay off the mortgage. The case, therefore, came within the principle of *Picard v. Mitchell*, *Haynes v. Barton*, and other cases, that the vendor ought to be completely indemnified, and, indeed, not to be put even to inconvenience.

What the company did was to allow the matter to proceed, and they must take the consequences. It was said that the vendor was in fault for contracting to sell the fee without mentioning the incumbrance, but the subsequent transactions cured this default. The company left the vendor to take his own course to clear the title, and the cost of doing so was part of the costs of the purchase covered by the 80th section. Or, if the concurrence of the trustees were regarded as matter of conveyance these expenses would be payable by the company under the 82nd section.

(a) 14 Beav. 418.

(b) 4 W. R. 111.

(c) 1 M. & G. 210.

(d) 12 Beav. 486.

(e) 9 W. R. 777.

(f) 28 Beav. 621.

The certificate, therefore, must be reviewed and all the costs incurred in the suit must be allowed, subject to the moderation of the bill by the Taxing Master. The costs of the taxation to follow the usual rule.

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PERKINS v. COOKE. 48959

H. W. P. SMITH, by his will dated 21st of November, 1855, devised and bequeathed all his real and personal estate, upon trust to permit the Defendant *Harriet Downer*, his housekeeper, to hold and enjoy the rents of his dwelling-house for her life, and after her decease to sell the said dwelling-house and stand possessed of the proceeds as to one moiety for *Chelsea Hospital*, and as to the other moiety for *Greenwich Hospital*; but in case either of these gifts should be declared void, or the Attorney-General should give an opinion to that effect, then upon trust for the King or Queen of *Great Britain* reigning at the time of the decease of the said *Harriet Downer*. And upon further trust to permit the said *Harriet Downer* to hold and enjoy the household effects and other matters for life; but in case of removal of these effects from the said house, then upon trust to sell the same and to permit the proceeds to fall into and become part of his residuary moneys. The will proceeded thus:—"And upon further trust, out of the dividends, interest, and annual proceeds arising from my residuary moneys and estate, to pay unto the said *Harriet Downer* one annuity or clear

July 4th & 9th. 11th Dec.

Will—Annuity
— Payment out
of Corpus.

Testator gave his real and personal estate to trustees, on trust out of the income of his residuary estate to pay an annuity of £200, and after the decease of the annuitant to permit the fund out of which the annuity might arise again to fall into and become part of his general residuary estate; and as to all his pure personality, and so much of the annuity fund as should consist of pure personality, subject and without prejudice to the annuity, to hold the same upon trusts for charity, and as

to the rest of his estate for the Queen.

By a proviso the trustees were authorised to set apart a fund sufficient to produce the annuity, and when that should have been done were to be entitled to deal with the residue. The income of the estate was insufficient to produce the annuity:—*Held*, that the arrears were to be made good out of the corpus.

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annual sum of £200 of lawful *English* money by two equal half-yearly payments in each year, for and during the term of her natural life, the first of such half-yearly payments to be made at the expiration of six calendar months next after my decease ; and from and after her decease, then upon trust to permit the capital or fund out of which the said annuity shall or may arise, again to fall into and become part of my general residuary personal estate." And as to all other his moneys and funded property not being the proceeds of realty or mortgages, " and also from and after the decease of the said *Harriet Downer* as to and concerning such part of the capital or fund out of which the said annuity shall arise, as at the time of my decease shall consist of money or funded property, such money, if any, not being secured on mortgage of any freehold, leasehold, or copyhold estate, and subject and without prejudice to the annuity hereinbefore directed to be paid to the said *Harriet Downer*," he directed that the trustees should stand possessed thereof in equal moieties for *Chelsea* and *Greenwich* Hospitals ; and as to his estate and effects, if any, which could not be legally bequeathed for the benefit of the said hospitals, upon trust for the King or Queen of *Great Britain*. And the will contained a proviso as follows :—" Provided also, that as to and concerning the annuity hereinbefore directed to be paid to the said *Harriet Downer* for her life, it shall be lawful for the trustee or trustees of this my will, immediately or at any time after my decease, to set apart so much of any of my Government stock as will, at the time it may be so set apart, yield in the yearly dividends thereof the annual sum of £200 sterling ; but in case I shall not, at the time of my decease, be possessed of any Government stock, or if I shall be possessed of any such stock and the same shall not be sufficient to yield the said annual income, then it shall be lawful for the said trustee or trustees to purchase so much of such stock as will be necessary, with the stock of which I may be possessed at my decease, to yield the said annual

income, or in case I shall not be possessed of any such stock at my decease, then to purchase so much as will yield the said annual income, and to set apart the same to answer the said annuity; and when and so soon as there shall be set apart Government stock sufficient at that time to answer the said annuity, my said trustee or trustees shall be entitled to deal with the residue of my estate and effects in manner hereinbefore directed, and thenceforth the dividends of the stock so set apart shall be deemed sufficient to answer the said annuity, notwithstanding the same shall at any time thereafter fall short of the said annual sum of £200. And the said *Harriet Donner* shall accept and receive the said dividends in full satisfaction of the said annuity."

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The testator died in 1859, leaving no real estate except the said house, and leaving certain personal estate which was not sufficient to produce an income of £200 a-year. Considerable arrears of the annuity had accumulated.

The bill was filed by the trustee against *Harriet Downer* and her husband, and *The Attorney-General*.

Mr. *Rolt*, Q. C., and Mr. *Shebbeare*, for the Plaintiff.

Argument.

Mr. *Wickens*, for the Crown :—

The annuity is not payable out of the corpus.

In the first place, there is no gift of the annuity at all except in a direction to pay out of the income of the residuary estate. This distinguishes the case from those where the annuity is given absolutely, and is followed by a mere disposition of the residue as such. The annuitant and the charities, or the Crown, stand in the relation of tenant for life and remainderman, rather than in that of annuitant and residuary legatee; and therefore the annuity is only payable out of income: *Baker v. Baker* (a), *Stel-*

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fox v. Sugden (a), Earle v. Bellingham (b), Addecott v. Addecott (c).

Mr. *Martindale* for the annuitant :—

The case is not within *Baker v. Baker*, for the direction is, that, on the decease of the widow, the fund producing the annuity is to fall into the residue, and this brings us within *Bright v. Larcher (d)*. The residue is subsequently given subject and without prejudice to the annuity; and finally the testator, by saying that the trustees may set apart a fund sufficient for the annuity, and after doing that shall be entitled to deal with the residue, excludes the right to deal with it until the annuity is fully satisfied: *Wright v. Callender (e), Heath v. Nugent (f)*.

Mr. *Wickens*, in reply, distinguished *Bright v. Larcher*, on the ground that there was, in that case, a gift of the annuity in the first instance.

July 9th.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This case involves a question of some nicety—whether or not an annuity given by the testator's will is payable out of capital, the assets not being sufficient to produce an income of the required amount, and some arrears having accumulated.

There are some peculiarities in the will which distinguish this from all the cases decided on either side. *Bright v. Larcher*, on the one hand, though it goes some way towards the point, is certainly not on all fours with the present case, because there was, in that case, a distinct gift of an annuity,

- (a) Johns. 234.
- (b) 24 Beav. 445.
- (c) 29 Beav. 460.

- (d) 3 D. G. & Jo. 148.
- (e) 2 D. G. M. G. 652
- (f) 29 Beav. 226.

which was held to be charged on the real estate. On the other hand, *Baker v. Baker* does not seem to be parallel. The will in that case contained a simple direction that a sum of stock should be set apart, and that out of the dividends an annuity should be paid; and then there was a gift over. It was merely the case of a tenancy for life with a gift over, and was decided on the principle that both the objects of the testator's bounty had equal rights, and that there was no reason why any advantage should be given to the tenant for life over those interested in remainder. That is consequently quite distinct from the case of a gift of an annuity followed by a gift of residue, as in *Bright v. Larcher*.

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In the will before me there is no gift of the annuity, except in a direction to pay out of the income of the residuary estate. The testator then proceeds with the tacit assumption that a fund will be set apart for the annuity, inasmuch as he directs, that, on the death of the annuitant, the capital or fund out of which the said annuity shall or may arise shall again fall into and become part of his residuary personal estate. Subsequently, however, he separates the residue into two parts, and specifically gives to the charities so much of the fund out of which the annuity shall arise as shall consist of pure personalty. In a certain sense, therefore, it may be said that there is a specific gift over of this fund. But that reasoning is more ingenious than solid, because the intention is clearly expressed, that the annuity fund is to fall into the residue; and the object of the clause relied on is merely to distinguish between what is to go to the charities and what is to go to the Crown.

It comes, therefore, to this simple point: a direction to the trustees to whom the real and personal estate is devised and bequeathed, to pay an annuity out of the income of the residuary estate, followed by a direction, that, on the death of the annuitant, the fund out of which the annuity shall or may arise is again to fall into the general residue; and

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a further direction, that the pure personalty set apart for the annuity and all other the pure personal estate shall, after the decease of the annuitant, subject and without prejudice to the annuity, be paid to certain charities, and the rest to the Crown.

There is another clause, in a subsequent part of the will, empowering the trustees to set apart a sufficient fund to produce the annuity, after which they are to be entitled to deal with the residuary estate. Mr. *Wickens* observed correctly, that there was no gift except in the direction to pay out of the income of the residuary estate, and that this last-mentioned clause was merely permissive.

There is one authority which comes very near to this case—*Boyd v. Buckle* (a),—but it does not appear to have been satisfactorily argued, for the reasoning went on the supposed existence of a first charge of the annuity; whereas, as the Reporter observes in a note, it did not appear that the testator had, in terms, so charged his estate. All that there was, was a direction, that, in case a leasehold estate of the wife's should drop in her lifetime, the trustees should pay to her, out of the dividends of a sufficient part of the personal estate, an equivalent for the rent lost; and then, after various legacies, there was a gift of the residue on trust to accumulate during the term, and after its expiration to pay the income to the widow for life, and then over. The lease expired, and the income of the residue was not sufficient to make good the loss; and it was held that it should be made good out of the capital. That seems to have been decided on the footing that a direction to pay out of rents means out of perpetual rents, and is equivalent to an absolute gift; that was, at any rate, the line taken in argument, but it is not, to my mind, satisfactory reasoning, when the subject matter is an annuity and not a

(a) 10 Sim. 595.

gross sum. The argument on the other side is remarkable, for counsel seems to have put the case higher against himself than the language of the will warranted. He says, the difficulty arises from the inconsistent dispositions made by the testator in the first and last clauses of the will, the first giving compensation out of the estate, and the last out of the interest of the residuary estate. Counsel, therefore, created an imaginary difficulty, and the decision went on the ground that the ultimate trust did not take away the benefit of the first charge, no such charge having in reality been created.

1882.
 PERKINS
 v.
 COOK.
 —
Judgment.

Without relying on this decision, I think the principles established by authority are sufficient to entitle the annuitant under the will before me to payment out of the corpus. Although in *Bright v. Larcher* there certainly was an express gift of the annuity, which is wanting here, the observations of the Lords Justices in that case point to a principle wide enough to cover the present. L. J. *Knight Bruce* intimated a doubt as to the arrears of the annuity; but L. J. *Turner* says, "I do not intend to intimate the least doubt as to the decision of the House of Lords in *Baker v. Baker*. I agree with the decision in that case; but I think the present case distinguishable from it in this respect, that here there is an ultimate direction that the fund shall be applied as the residue is to be applied. Now no one can take the residue until after payment of the arrears of the annuity."

It is manifest on this will that the testator had an anxious desire to provide for this annuity. He assumes (as a testator generally does) that his assets will be sufficient, and makes no express provision for the event of a deficiency; but, having regard to the direction that the fund is to fall into the residue on the death of the annuitant, to the gift over 'subject and without prejudice to the annuity,' and to the proviso that the trustees may set apart a fund, and after doing so are to be at liberty to

1862.
 PERKINS
 v.
 COOK.
 Judgment.

deal with the residuary estate, (which implies that until then they were not to deal with it,) I think, upon the whole will taken together, there is a sufficiently clear indication of an intention that the annuity should be paid before the residuary legatees take any benefit from the estate. The arrears must, therefore, be paid out of the corpus.

SC. 1. New & 2. 672. ———
 2 11 1/2 666
 4 6 1/2 508
 9 8 1/2 319
 2 8 1/2 172.

1880.
 Nov. 8th & 15th.
 Joint Stock
 Company—
 Amalgamation
 —Ultra Vires.

RE ERA ASSURANCE SOCIETY.

WILLIAMS' CASE.

ANCHOR CASE.

A life and fire insurance society purchased the business of a life assurance company, taking all the assets, and undertaking all the liabilities:—Held, that, in the absence of any special power in their deed of settlement, the transaction was ultra vires,—that securities under the seal of the purchasing company, given in carrying out this arrangement to creditors of the selling company were void; and that such creditors were not entitled to prove against the purchasing company, which was in the course of winding up.

IN March, 1856, the *Saxon Life Assurance Society* borrowed from the *Anchor Life and Fire Insurance Company* the sum of £1,500, secured by a deed of mortgage of certain policies and assets, dated the 19th March, 1856, which contained covenants for payment by the *Saxon Society* as principals, and several persons as sureties.

An agreement was entered into on the 15th July, 1856, by which the business of the *Saxon* was to be transferred to the *Era Assurance Society*. This agreement was approved by special general meetings of both companies.

On the 17th January, 1857, the *Saxon Society* was ordered to be wound up, subject to the said agreement.

On the 28th and 30th January, 1857, agreements were come to modifying the agreement of 15th July, 1856, for the transfer of the business of the *Saxon*; and on the 11th June, 1857, an order was made in chambers staying the winding up, in order to enable these agreements to be carried out.

On the 1st August, 1857, a deed was executed to carry out the transfer from the *Saxon* to the *Era*, and thereby the *Era* covenanted with the *Saxon* to pay certain scheduled debts, including the debt to the *Anchor* Company and a debt to a Mr. *Williams*; and the assets, business, and goodwill of the *Saxon* were thereby transferred to the *Era*.

1860.
 RE ERA
 ASSURANCE
 COMPANY.
 —
 Statement.

In pursuance of this arrangement, it was proposed, on the part of the *Saxon* and *Era* Societies, that the *Anchor* should give up their security of the 19th March, 1856, to be cancelled, and accept in lieu thereof a security of the *Era* Society. This was assented to; the old deed was accordingly cancelled, and a new deed of mortgage and covenant, dated the 29th September, 1857, was given by the *Era* to the trustees of the *Anchor* Company for the then balance of £1,200. This deed did not mention the fact of the arrangements with the *Saxon*, but recited an advance from the *Anchor* to the *Era*, and was framed as an ordinary security of the *Era* Company, such as they were competent to issue for the purpose of raising money. It appeared by a marginal note on the draft that all reference to the *Saxon* had been avoided at the instance of the *Anchor* Company.

The *Era* Society took possession of the assets and business of the *Saxon*, and paid debts in excess of the moneys received.

On the 29th May, 1858, the *Era* Society was ordered to be wound up, and claims were made by *Williams* and by the *Anchor* Company to prove against the *Era*. There was no clause in the deeds of settlement either of the *Saxon* or the *Era* providing for amalgamation with any other companies.

The *Era* deed described the business of the Company to be—effecting assurances on lives and against fire, and con

1860.
 RE ERA
 ASSURANCE
 COMPANY.

Statement.

tained a clause (the 38th), which, after giving various powers to the directors, empowered them, generally, where the deed was silent or did not otherwise provide, to act in the direction of the concerns of the society in such manner as at their absolute discretion they should think most conducive to the interests of the society, and for that purpose to make, do, and execute all such acts, deeds, matters, and things whatsoever as might be requisite or expedient in that behalf.

WILLIAMS' CASE

Argument.

Mr. *Daniel*, Q.C., and Mr. *Morris*, for *Williams* :—

The amalgamation was approved by the shareholders in both Companies, who, in these trading undertakings, have a large discretion: *Simpson v. Westminster Palace Hotel Company* (a). The deed of settlement of the *Era* empowers the directors to act in such manner as, at their absolute discretion, they shall think most conducive to the interests of the society; and this is sufficient to validate the deed, independently of the assent of the shareholders: *Ernest v. Nicholls* (b), *Balfour v. Ernest* (c).

The transaction being valid, *Williams* is entitled to rank as a creditor of the *Era*, who undertook the liability to him.

Mr. *Giffard*, Q.U., and Mr. *Reilly*, for the Official Manager :—

The amalgamation was ultra vires of both companies, and the directors of the *Saxon* were, moreover, interested; the contract was, therefore, void under the 29th section of 7 & 8 Vict. c. 110.

Even if two Life Assurance offices could amalgamate without special power, one of these was a Life and Fire

(a) 2 D. G. F. & J. 141.

(b) 6 H. L. Cas. 401.

(c) 5 C. B., N. S., 601.

Insurance company, which was an entirely different business from life insurance alone: *Anglo-Australian Insurance Company v. British Provident Insurance Society* (a), *Australian Steam Clipper Company v. Mounsey* (b).

Mr. Willcock, Q.C., and Mr. Roxburgh, for the Creditors' Representative.

Mr. Daniel replied.

1860.
RE ERA
ASSURANCE
COMPANY.
Argument.

ANCHOR CASE.

Mr. Giffard, Q.C., and Mr. Reilly for the Official Manager.

Mr. Willcock, Q.C., and Mr. Roxburgh, for the Creditors' Representative, cited *Bank of Ireland v. Evans' Trustees* (c).

Mr. Rolt, Q.C., and Mr. Rodmell, for the Anchor :—

Even if irregular, it would be a fraud now to dispute our claim. We could not question the transaction, and how can the *Era* do so? On the face of it the deed is perfectly regular, and the *Era* are estopped from disputing it.

[They cited *Taylor on Evidence* (d), *Carter v. Carter* (e), *Prince of Wales Insurance Company v. Harding* (f), *Ex parte Eagle Insurance Company* (g), *Agar v. Athnæum Assurance Society* (h).]

VICE-CHANCELOR SIR W. PAGE WOOD :—

Judgment.

Both these cases turn in great measure on the question, what power the directors of the *Era* Company had to amalgamate, as it is called, with the *Saxon* Company; that is to say,

- (a) 5 Jur., N. S., 1280.
- (b) 6 W. R. 734.
- (c) 5 H. L. Cas. 389.
- (d) Vol. I., page 105.

- (e) 3 K. & J. 617.
- (f) 4 Jur., N. S., 851.
- (g) 4 K & J. 549.
- (h) 3 C. B., N. S., 725.

1860.
RE ERA
ASSURANCE
COMPANY.
Judgment.

to take upon themselves the business of another company with all its assets and liabilities, that business being not exactly of the same character as their own, inasmuch as the one was a Life office and the other a Life and Fire office.

Without dwelling on this point, I will assume, in favour of the claims, that the two companies were engaged in the same kind of business, and that the addition of fire insurance in the one case makes no difference.

Viewed in this way, the matter reduces itself to the question whether there was any power in the directors of either company to effect this amalgamation, and, in particular, whether it was competent for the *Era* to undertake all the existing policies of another company. It appears to me quite clear that this could not be done without some special power in the deed of settlement to authorise such a transaction. I find nothing of the kind beyond the general power given to the directors by the 38th clause of the *Era* deed. This empowers the directors to act in the direction of the concerns of the society as, in their discretion, they shall think most conducive to its interests; but this must mean, to act within the limits of the business as defined by the deed, which is to effect assurances in the ordinary course. The deed specifies in many particulars the manner in which life policies are to be effected. There is to be a medical certificate, and a careful inquiry in each case; and the shareholders trust to the discretion of the directors, to be exercised upon the information so obtained. The shareholders who elected the directors to exercise a special discretion of this kind on every occasion, could not have meant to authorise the board to accept a mass of policies on lives of which they could know nothing beyond the fact that they had been accepted by another company. If such a transaction were valid, the shareholders would be subjected to liabilities which they never contracted to undertake. Still less

did they authorise the directors to take upon themselves all the debts of another company. It is said, that the directors of the *Era* were empowered and bound so to conduct the business as to provide capital to carry it on; and that, under the power of raising money in case of need, it was competent for them to contract debts like those claimed by the *Anchor* and Mr. *Williams*. But there is not a single clause in the deed, except the 38th, which I have already considered, which can be supposed to enable the directors to take on themselves all the debts of another concern.

I cannot hold that the shareholders gave authority to the directors either to purchase a large number of policies in the mass without investigation, or to undertake the debts of another company.

The observations of some of the Judges in the case of the *Sea Fire Life Company* (a), as to the possibility of a ratification by the shareholders of a transaction of this kind, must be understood with reference to the facts of that case, where, in one of the deeds of settlement, that mode of effecting the purchase of another business was expressly pointed out; and the Judges, without expressing any opinion on the general point, simply notice the fact that such a power was given by the deed.

In the present case, there is no power of the kind, either in the directors or in a general meeting; and no meeting could bind a single dissentient shareholder to such an arrangement. It cannot be supposed, that a company formed for one purpose could, by any possibility, bind the shareholders to an application of the assets to purposes altogether beyond the scope of the deed. There are abundant authorities to prove that joint stock companies cannot exceed the powers of their deeds.

1860.
 RE ERA
 ASSURANCE
 COMPANY.
 —
 Judgment.

1860.
RE ERA
ASSURANCE
COMPANY.
—
Judgment.

It is true, that, in the course of the winding-up of the *Saxon*, the proceedings were stayed, on the allegation that the *Era* was about to make an arrangement of the nature of that which has been attempted by this deed. Possibly, it might have been better if an inquiry had first been made, whether the companies had the power, which they assumed to possess, to enter into this arrangement; but all that was done in fact was, to stay the proceedings on an ex parte application, for the purpose of avoiding expense which might prove needless; and the order in no way bound the *Era* or any one connected with it.

Having stated my view of the amalgamation, it remains only to consider the circumstances of the two claims which are now brought forward.

Williams's case is this: He claims in respect of a sum of £200, which he paid on behalf of the *Saxon*. It was a debt which the *Saxon* was bound to meet, and which the *Era*, as part of the amalgamation-contract, expressly undertook to provide for. *Williams*, accordingly, claims against the *Era*. It appears to me clear that the *Saxon* company is the debtor to *Williams*, and that he cannot call upon the *Era* to pay the debt.

With respect to the claim of the *Anchor Company*, there can be no doubt that they were misled into giving up their security against the *Saxon*, whatever it may have been worth, and taking in exchange for it what purports to be a security of the *Era*, but is, in fact, no valid security at all. They were not, perhaps, entirely in the dark, because there is a marginal note on the draft of the new security, which shows that there was, at any rate, some apprehension that the transaction might be questioned; but they, no doubt, took the security in the belief that it was valid. It is not necessary to dwell on the supposed estoppel of the deed. The shareholders of

the *Era* could not be made responsible for this debt. The directors having no power to bind the shareholders, as they attempted to do, by the arrangement for the transfer of the debts of the *Saxon*, put the new deed in such a shape as to give it a colour of legality. But all the parties were evidently aware that the deed of settlement required an actual advance to be made, in order to warrant the issue of such a security ; and a false recital of such an advance was accordingly inserted.

1860.
 RE *ERA*
 ASSURANCE
 COMPANY.
 Judgment.

I say nothing as to the contention that the transaction was void by reason of the alleged interest of certain of the directors, because, apart from that question, the case before me turns simply on the question, "Can Company A fasten its liabilities on Company B, without any special power in either of their deeds of settlement to make such a transaction binding on the shareholders?"

If there had been power in the *Era* to buy the business of another company, there would have been no objection to the giving of the security to the *Anchor* in pursuance of the arrangement. If the transaction had been good in substance, I do not see any objection to the mode of carrying it out. But holding that there was no power to purchase the business, I must hold that there was no consideration binding on the *Era* proprietors for the execution of this instrument to which the directors set the seal of the company. Whatever hardship this may involve to the *Anchor* I must regard the rights of the *Era* proprietors, who cannot be assumed, either de facto or de jure, to have known more than that they would be bound to the extent authorised by their deed of settlement.

There has been no laches to affect this case on the footing of acquiescence ; and whatever remedy there may be in respect of the assets of the *Saxon* actually received by the *Era*, it is sufficient on this occasion to say, that neither of the claims can be allowed as debts. There will be no costs.

1863.

June 24th,
July 9th.

Joint Stock
Company—
Ultra Vires—
Purchase of
Business of
another Com-
pany—Trans-
fer of Liabili-
ties—Rights of
Creditors—
Jurisdiction—
Mistake in
Law.

An Insurance
Company pur-
chased the busi-
ness, received
the assets, and
undertook the
liabilities of an-
other Insurance
Company. A
creditor of the
selling company
cancelled his
security, and
accepted a sub-
stituted secu-
rity of the pur-
chasing com-
pany. The
purchase
having been
held void as
ultra vires:—
Held, that the
Court has juris-
diction to re-
lieve against a
mistake in law,
and that the
creditor was re-
mitted to his
original rights
against the sell-
ing company,
and was entitled
to prove in
winding-up
proceedings.

The purchas-
ing company having actually received all the assets, and taken the business of the selling com-
pany, and both companies having since been wound-up:—*Held*, that the purchasing company
was not entitled to prove against the selling company an excess of debts paid over assets re-
ceived—it being impossible to restore both companies to their original situation.

The Creditors' Representative is entitled to appear on an adjourned summons by the Official
Manager to establish a debt claimed to be due to the company.

1665 H. 504
affirmed 289 J & S 29. 16 Eq. 425.
1441 H. & T. 2. 9 Ch. 613

RE SAXON LIFE ASSURANCE SOCIETY.

ANCHOR CASE.

ERA CASE.

IN 1857, the *Era Assurance Society* purchased the
business of the *Saxon Life Assurance Society*, received
all the assets, and undertook all the liabilities. The *Era*
paid some of the liabilities, to an amount exceeding the
assets received by them. They also gave a mortgage and
covenant to the *Anchor Insurance Company*, for a debt
due to them from the *Saxon*, in substitution for a similar
security held by the *Anchor* against the *Saxon*, which was
given up and cancelled.

The *Saxon* and *Era* Companies were both ordered to be
wound up; and in the matter of the *Era* it was held that
the security given by them to the *Anchor* was void, the
transfer of the business having been ultra vires. See the
report, ante, p. 400, where the facts of the transaction are
fully stated.

The *Anchor* Company took out a summons claiming
to be remitted to their old rights as creditors of the *Saxon*,
and to prove for their original debt against that company,
on the ground that the substituted security given by the
Era had been found invalid, and that the consideration for
the cancelling of their original security had entirely failed.

The Official Manager of the *Era* Company also took
out a summons to be allowed to prove for the amount
which the *Era* Company had paid in respect of the lia-

bilities of the *Saxon*, before the transfer of the business had been held invalid, less the value of the assets of the *Saxon* received by the *Era* Society under that arrangement.

1862.
RE SAXON
LIFE ASSUR-
ANCE SOCIETY.

Statement.

It appeared in evidence that the *Era* had received the whole assets and business of the *Saxon* Society, and paid some of the liabilities; but that the amounts received in respect of the assets and business were less than the sums paid in respect of such liabilities by about £3,000. There were also further liabilities of the *Saxon* which the *Era* had not satisfied, some of which had been held not binding on the *Era*.

Both claims were adjourned into Court.

ANCHOR CASE.

Mr. *Rolt*, Q.C., and Mr. *Rodwell*, for the *Anchor* Company.—The Court can relieve against mistakes in law: *Stone v. Godfrey* (a); and, whether this was a mistake of law or fact, we did accept the substituted security, under the impression that it was valid. It turns out a nullity; and there was, therefore, no consideration for the cancelling of the old deed.

Argument.

Mr. *Daniel*, Q.C., and Mr. *Morris*, for the Official Manager of the *Saxon*.

Mr. *Hadden*, for other parties.

Mr. *Prendergast*, for the sureties under the deed of 19th March, 1856.

Mr. *Rolt*, replied.

ERA CASE.

Mr. *Giffard*, Q.C., and Mr. *Reilly*, for the Official Manager of the *Era*, cited *Balfour v. Ernest* (b).

(a) 5 D. M. & G. 76.

(b) 5 C. B., N. S. 601.

1868.
 RE SAXON
 LIFE ASSUR-
 ANCE SOCIETY.

Argument.

Mr. Willcock, Q. C., and Mr. Roxburgh, for the Creditors' Representative of the *Era*.

Mr. Daniel, and Mr. Morris, for the Official Manager of the *Saxon*.

Mr. Hadden, for other parties.

Mr. Giffard replied.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

There are two claims in this matter, one by the *Anchor Insurance Company* and the other by the *Era Assurance Society*.

The claim of the *Anchor* arises in this way. They originally held a security of the *Saxon Assurance Society* for moneys advanced by the *Anchor*. Subsequently to this, the *Saxon* came to an arrangement with the *Era*, by which the whole assets and business of the *Saxon* were transferred to the *Era* Society, which undertook to provide for all the liabilities of the *Saxon*.

This arrangement was so far recognised in chambers, that proceedings which had been taken for winding up the *Saxon* were stayed, and a deed was afterwards executed on the 1st of August, 1857, between the *Saxon* and the *Era* Companies, for the purpose of carrying out this arrangement. Upon this being done, it was proposed that a new security of the *Era* should be substituted for the existing security which the *Anchor* Company held against the *Saxon*; and the *Anchor* Company assented to this proposal, accepted the new security, and cancelled the old one.

At a later period the validity of the transaction between the *Saxon* and the *Era* was questioned; and it was held in this Court that the deeds of settlement of those companies did

not authorise the transfer of the business, and that the deed of the 1st of August, 1857, was ultra vires; and the claim of the *Anchor* Company against the *Era* was accordingly disallowed. The consequence is, that the security given by the *Era* to the *Anchor* in consideration and in pursuance of the transfer of the business and in substitution for a liability of the *Saxon* was a mere nullity from the first. That circumstance distinguishes the case from those where securities have failed from subsequent occurrences. No consideration, in fact, passed between the *Anchor* and the *Saxon* for the surrender of the original security; for that which purported to be the consideration for it was the obligation of the *Era*, which was from the first a mere nullity.

1862.
RE SAXON
LIFE ASSUR-
ANCE SOCIETY.
Judgment.

The *Anchor* Company, accordingly, claim to be remitted to their original rights against the *Saxon*, and to prove in the winding-up for the amount of the debt. The answer attempted on the part of the Official Manager of the *Saxon* is, that the *Saxon* altered their position in consequence of the dealing with the *Era*; that they cannot be restored to their original situation; and that the liabilities which were cancelled as part of that transaction, cannot, in justice, be revived. They say, that the essence of the transaction was, and that the *Anchor* Company knew that it was, that they, the *Saxon*, should be freed from this among other liabilities; in consideration of which, they have given up all their property; and as this cannot now be restored, the *Anchor* are not entitled to be remitted to their former rights. In point of fact this contention is not established. It is quite true, that the managers of the *Anchor* Company knew what the transaction was; but it is impossible to say, that, by simply releasing the debt of one company in consideration of a substituted security by another, the *Anchor* Company supplied the real consideration of the whole transaction. The dealing between the *Saxon* and *Era* was an independent matter, to which the substitution of this particular security was only incidental; and it does

1862.
 RE SAXON
 LIFE ASSUR-
 ANCE SOCIETY.
 ———
Judgment.

not appear that those who represented the *Anchor* were in any way instrumental in bringing about the arrangement. The two companies immediately concerned being anxious to effect the transfer, the creditors of the one consented to substitute the credit of the other, on the assumption that the security offered to them in exchange was a valid obligation on the *Era*. All parties, no doubt, supposed that the transaction was legal, and it comes to this, that, by a common mistake of the *Saxon* and *Era* Companies, a creditor of the *Saxon* has been led to give up a security in exchange for a deed which is a mere nullity.

A question has sometimes arisen how far this Court can interfere to rectify a mistake in law ; but, having regard to all the authorities, and especially to *Stone v. Godfrey*, I have no doubt of the jurisdiction. In *Stone v. Godfrey* the Plaintiff had been advised that he was not tenant by the curtesy ; and, on the assumption that he had no such right, he concurred in a partition suit. Afterwards, the advice was ascertained to be erroneous ; and upon the subsequent facts it was held, both by the Master of the Rolls and the Court of Appeal, that the Plaintiff was barred of relief by his own conduct and laches : but both of the Lords Justices rested their judgments upon that alone ; and L. J. *Turner* expressly said, that he felt no doubt that the Court had power to relieve against mistakes in law as well as against mistakes in fact.

I must, therefore, hold that the *Anchor* Company are entitled to be replaced as creditors of the *Saxon*.

The other case is of a different complexion. The *Era* Society undertook the liabilities of the *Saxon*, and, like the *Anchor* Company, did so, I have no doubt, being fully satisfied that the transaction was legal, and, in a certain sense, under the sanction of the Court, inasmuch as the winding-up proceedings were stayed in consequence of this arrangement.

Accordingly, all the assets of the *Saxon* were, pursuant to the agreement, handed over to the *Era*; and now it is said, that, although the *Era* escape a large proportion of those liabilities, of which the *Anchor* claim is one example, the assets received from the *Saxon* have not sufficed to cover the remaining liabilities, and that the *Era* are losers to the amount of about £3,000. The *Era* consequently claim to prove the excess of their payments over their receipts on account of the *Saxon* as a debt against this company.

1862.
 RE SAXON
 LIFE ASSUR-
 ANCE SOCIETY.
 Judgment.

Now it must be borne in mind that the bargain between the two companies was, that the *Saxon* should give up their whole property, their policies, and the goodwill of their business, as the consideration for the *Era* undertaking their liabilities. That was a consideration which the *Era* evidently supposed to be valuable. Now they say, they were misled as to value. But it is to be observed, that no fraud on the part of the *Saxon* is proved, and scarcely even suggested. The claim, therefore, can stand only on the ground of a common mistake. But then the question arises, whether the parties can be replaced in their original situation; and this creates an insuperable difficulty. I cannot bring back the assets and the business of the *Saxon*, or in any sense restore the original position of affairs; and, when the substantial justice of the case is considered, it is obvious that the *Era* obtain more than the rights they stipulated for. The contract was to undertake all the liabilities, in consideration of receiving all the assets. They have received the whole assets, and have escaped part of the liabilities. They have had all the benefit which they contemplated, though it is true that the bargain has turned out a bad one.

The case of *Balfour v. Ernest*, which was referred to, is not precisely in point as to the principle; but, even if it were, the difficulty would still remain, that it is not

1862,
RE SAXON
LIFE ASSUR-
ANCE SOCIETY.
Judgment.

practicable to restore both parties to their old position. Part of the assets which formed the consideration of the agreement consisted of the goodwill of the business; and merely giving credit for moneys received, as the *Era* offer to do, is not handing back the assets or restoring the *Saxon* to its former situation. This is now impracticable, and the claim of the *Era* Society must, therefore, be disallowed.

Mr. *Giffard*, Q. C., submitted that the Creditors' Representative of the *Era* was not entitled to appear, and ought to have no costs. It was true, that it had been decided that he might appear to resist a claim against the Official Manager, but he had never been allowed to appear to support a claim which the Official Manager made.

Mr. *Willcock*, Q. C., and Mr. *Roxburgh*, argued, that the Creditors' Representative had always a right to appear on a claim affecting the assets.

The VICE-CHANCELLOR said, that it seemed to be decided that the Creditors' Representative was entitled to appear in Chambers on any claim of this kind; and he must hold him equally entitled when the summons was adjourned into Court. His costs must, therefore, be allowed.

8 Ch D 462

CASES IN CHANCERY.

415

17 Eq. 410

1862.

May 12th.

RE SYKES'S TRUSTS.

SUSANNAH PERKINS, having a power of appointment over a fund of £35,000 stock after the decease of herself and her husband, by her will, dated the 1st November, 1849, appointed the same upon trust for her six daughters, by name, equally to be divided, "So nevertheless that the shares hereinbefore by me appointed to my said daughters respectively, and the annual income thereof, may be for the sole and separate use, benefit, and disposal of them my said daughters, and not to be subject to the debts, control, contracts, or engagements of their respective present or any future husband; and so that the receipts of such daughters respectively shall be good and sufficient discharges for their said respective shares to the trustees or other persons paying or transferring the same respectively; and so also that such daughters respectively shall not, while under any coverture, either alone or with their respective husbands, make any sale, mortgage, charge, or incumbrance of or upon their respective parts or shares of the said trust fund, or of the annual income thereof." And in a subsequent clause it was provided, that if any of the daughters should die within twenty-one years from the death of the survivor of testatrix and her husband without having

that he should be paid out of the fund if he would offer no opposition to her application for payment out of court; and it was accordingly paid to her:—*Held*, that *D.* had no charge on the fund, the letters being ineffectual by reason of the restraint on anticipation, and the subsequent parol promise being void for want of consideration and under the Statute of Frauds.

Upon evidence that a married woman desiring to execute a voluntary settlement transferred stock, to which she was entitled for her separate use, into the names of trustees, and approved of a draft declaration of trust:—*Held*, that there was a locus penitentiae, and that the trusts did not attach, unless the draft had been finally authorised before the transfer to the trustees; and an inquiry to that effect being answered in the negative, the fund ordered, on the petition of the married woman, to be retransferred for her separate use.

The non-production of a witness for cross-examination is no ground for a postponement of the hearing if the affidavit of the witness is withdrawn.

Married Woman—Separate Estate—Anticipation—Draft voluntary Settlement—Transfer—Locus Penitentiae—Practice—Order 19 of 1861.

A married woman *S.* was entitled to a gross sum, payable on the death of her father, for her separate use, subject to a restraint on anticipation. During her father's life she promised by letters to repay to *D.* out of the fund, when it fell in, advances made by him to her and her husband. After the death of her father the fund was paid into court, and *S.*, being still under coverture, verbally promised *D.*

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any issue then living, and no child of such daughter should have previously died, being a son, after attaining twenty-one, or a daughter after attaining that age or being married, then the actual and accruing share of such testatrix's daughter was to go and be held upon trust for the survivors or others of her said daughters equally, for their respective sole and separate use, in like manner as hereinbefore directed in respect of their original shares.

The testatrix died in 1851, and her husband in 1860.

By an order made on the 6th July, 1861, the trust fund, which had been paid into court, was ordered to be transferred to the respective daughters for their separate use—they mutually waiving their contingent interests by survivorship. One share was accordingly transferred to *Clara* the wife of *F. W. Sykes* (the present petitioner), for her separate use.

Mrs. Sykes being desirous of settling part of the fund, a draft declaration of trust was prepared by the solicitor of a *Mr. Dawes*, in which *Dawes* was made sole trustee of the fund. *Mrs. Sykes* was advised to add other trustees; and the fund was accordingly transferred into the names of *Dawes*, *Johnston*, and *Edmond*; and the draft settlement was altered by *Mrs. Sykes'* solicitors by the introduction of the two last-named trustees, and in some other particulars; and after being submitted to *Mrs. Sykes* and approved by her, the draft was sent to *Dawes'* solicitor. *Dawes* refused to act except as sole trustee, and alleged that he had a lien on the fund; and ultimately *Mrs. Sykes* called upon the trustees to retransfer the fund. It being considered doubtful whether the trusts of the draft declaration had not attached, the fund was paid into court, and this petition was presented for payment out to *Mrs. Sykes*. On the evidence it appeared that part of the fund was transferred into the names of the three trustees on the 10th, and the residue on the 16th of August, 1862; that the

draft declaration of trust had been sent by *Dawes'* solicitor to Mrs. *Sykes'* solicitors before the 10th August ; and after having been altered by Mrs. *Sykes'* solicitors, and approved by her, had been sent back to *Dawes'* solicitor, for his approval, on the 17th August.

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—
Statement.

An affidavit of the petitioner, who was abroad, was also filed on the 2nd of May, stating that she did not understand her approval of the draft to be conclusive upon her.

Evidence was also given by *Dawes* to the effect, that, after the death of Mrs. *Perkins*, and before the death of her husband, he had on various occasions made advances to Mr. and Mrs. *Sykes* on the written promises of the lady that he should be repaid out of this fund when it fell into possession ; that after the death of Mr. *Perkins*, and before the fund was paid out, he abstained from offering any opposition, on the assurance by Mr. and Mrs. *Sykes* that he should be paid out of the fund ; and that ultimately he consented to the proposed settlement of part, on the like assurance that he should be paid out of the residue, and should have the privilege of investing the settled fund upon property in which he was interested.

Before the hearing of the petition a bill had been filed by *Dawes* to enforce his claim, on the ground that the restraint on anticipation was ineffectual, the bequest being of a gross sum ; but to this bill a demurrer was allowed.

The petition now came on for hearing.

Mr. *Daniel*, Q.C., and Mr. *Hemming*, for the petitioner.

Argument.

Mr. *Martindale*, for *Dawes*, objected to the affidavit of Mrs. *Sykes*, on the ground that he required to cross-examine her. Fourteen days had not elapsed, and by Order 19 of 1861 he was in time to give notice to cross-examine.

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Mr. *Daniel* offered to withdraw the affidavit.

Mr. *Martindale* objected, that he had relied on the evidence to be obtained from Mrs. *Sykes* to establish his charge, and asked that the petition might stand over.

The VICE-CHANCELLOR held that the utmost he was entitled to was to have the affidavit withdrawn.

Mr. *Locock Webb* for Mr. *Sykes*.

Mr. *Jackson* for the children of Mrs. *Sykes*, who were interested under the trusts of the draft settlement :—

The approval of the draft and the transfer of the fund are sufficient to make a binding declaration of trust. It might be done even by parol, this being personalty. The sending the draft back to *Dawes'* solicitor, approved by the solicitors of Mrs. *Sykes*, was conclusive, and after that there could be no locus pœnitentiæ.

Mr. *Rolt*, Q. C., and Mr. *Martindale*, for *Dawes*.—Assuming the fund not to be bound by the draft, *Dawes* has a charge upon it.

We prove, first, written promises by the lady as well as by her husband, while the fund was reversionary; and a verbal assurance by Mrs. *Sykes* to the same effect after the death of the tenant for life, on the faith of which we offered no opposition to the payment of the fund to her out of court.

Wright v. Chard (a) shows that such a promise may be binding though the previous written charge may not have been effectual. There was a moral consideration sufficient to support an express promise after the lady became free from the restraint on anticipation. This would be so even at law.

(a) 4 Drew. 673.

Further, a restraint on anticipation has no application to a gross sum.

Mr. *Daniel* replied.

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Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

It seems to me that further investigation is necessary, to ascertain whether the draft had been finally settled before the transfer of the fund into the names of the trustees.

Judgment.

With respect to Mr. *Daves'* contention, it may very possibly be the case that he was induced to advance money on the faith of the promises contained in the letters of Mrs. *Sykes*; but at the time when the letters were written the lady had no power to bind herself by such engagements, and any debt arising out of the transaction is not her's, but her husband's. To allow it to be treated as her debt, she being subject to a restraint on anticipation, would be entirely to overthrow the whole protection which is given to married women by Courts of Equity. Those who deal with persons so situated must understand that the view of this Court is, that they are aiding the husband to rob his wife of her property. Then the question arises, whether she could possibly bind herself afterwards by parol to pay the debt which was so contracted. I apprehend that she clearly could not; and I say this without throwing the least shadow of doubt on the decision of Vice-Chancellor *Kindersley* which was cited, and which depended on a totally different state of facts. No person, even when *sui juris*, can bind himself to pay the debt of another without a writing under the Statute of Frauds, in which the consideration must be expressed. This was clearly the debt of the husband, and not of the wife, for it was contracted when she could not contract a debt at all. As the lady was not living separately from her husband it was his debt, both morally and legally; and her urgency in obtaining the

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Judgment.

money was for the sake of relieving her husband from his difficulties. Treating her, therefore, as a person sui juris after the life estate had dropped, we must treat the husband as a stranger; and the engagement which Mrs. Sykes is supposed to have entered into is invalid for want of a writing under the Statute of Frauds.

It was further suggested, that Mr. Dawes had acted on the faith of the representations made to him in not insisting on his claims when the fund was to be paid out to Mrs. Sykes. But that brings the matter back to the original question: What claims had he? He had no undertaking which he could enforce. It is said, however, that there was a moral consideration sufficient to support the promise; but it would be going far beyond the common law authorities to apply the doctrines on this subject to a case like the present between husband and wife. Moreover, I am bound to say, that, looking to the principles on which this Court acts, there is no moral duty on the part of a wife to pay the money which her husband has attempted to squander by anticipation. The question that presses on my mind is, whether the trusts of the draft settlement may not have attached. With reference to this there must be an inquiry, whether the trusts contained in the draft settlement were formally authorised by the petitioner before the funds were transferred into the names of the trustees.

The petition was subsequently brought on, upon the certificate of the Chief Clerk that the trusts were not finally authorised before the fund was transferred, the additional evidence being, that the draft was sent by Dawes' solicitor to Mrs. Sykes' solicitors, on the 7th August. That on the 13th the draft, as altered, was read over to Mr.

and Mrs. *Sykes* ; that Mrs. *Sykes* requested that a power of appointing £1,000 should be introduced, which was done ; that on the 15th August Mrs. *Sykes* authorised the insertion of a clause for settling after-acquired property ; that on the 16th August she proposed to increase the £1,000 subject to the power, to £2,000, but agreed to take time to consider this point before finally deciding it, and in the meantime directed the draft, in its then state, to be sent to Mr. *Dawes*' solicitor. There was also an affidavit by Mrs. *Sykes*, that, by approving the draft, she did not intend conclusively to bind herself.

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RE SYKES'
TRUSTS.
—
Judgment.

Upon the certificate the Court ordered the transfer of the fund to the Petitioner.

RE TRETOIL AND MESSER MINING COMPANY.

THIS was a petition by two shareholders for a winding-up order. The company was constituted in 1859, for working mines in the county of *Cornwall* on the cost-book principle.

March 23rd.
Winding-up
Petition—
Stannaries—
Creditor.

The workings were unprofitable ; and the machinery of the mine was, in April, 1860, agreed to be sold, the company being insolvent.

On a petition to wind-up a company within the Stannaries a creditor is not entitled to appear and oppose.

In July *T. Martyn*, a creditor, took proceedings against the petitioners for debts due from the company, and obtained certain payments from one of them. The mines were within the jurisdiction of the Vice-Warden of the Stannaries ; but the petitioners alleged that that court had no power to do justice in respect of the said debts, or to compel contribution by the other shareholders, except

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 RE TRETOIL
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 COMPANY.

Argument.

in a suit to which all were parties, nor any power to restrain creditors.

Mr. *Daniel*, Q. C., and Mr. *Beales*, opened the petition, and objected to a creditor being heard upon it.

Mr. *Phear*, for the company, did not oppose the prayer, if the Court had jurisdiction.

Mr. *C. Hall*, for *Martyn*.—The Registrar of the Stannaries Court is in possession of the property of the company ; and there are nice questions of Stannary law, involving the rights of certain execution creditors. The case is not one in which this Court has, or at any rate not one in which it will, exercise jurisdiction, the proper tribunal being the Stannaries Court. [He referred to 12 & 13 Vict. c. 108.] *Spackman's case* (a) decides that this Court only has jurisdiction in cases ejusdem generis with those specified in the Act. The effect of this petition would be equivalent to an injunction against creditors ; and I have a right to be heard against that.

[Mr. *F. W. Bush* (amicus curiæ) mentioned a case of the *North Tamar Mine*, before Vice-Chancellor *Kindersley*, in 1856, in which the Vice-Chancellor had refused to allow a petition for winding up a company within the Stannary jurisdiction to stand over for more than a week, pending a compromise, on the ground that the presentation of the petition itself operated as an injunction against creditors.]

Mr. *Daniel*, in reply, referred to the Joint Stock Companies Winding-up Amendment Act, 1857.

(a) 1 M. & G. 170.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I should be very reluctant to make a precedent for allowing a creditor to appear in opposition to a petition of this kind. It is provided by the statute that the Stannaries Court shall act "unless the Court of Chancery shall otherwise direct." The proceedings in that court, it is true, are not like those under a winding-up order. After a winding-up order, a creditor is required to make application to the Court for liberty to proceed; but in the Stannaries Court there is no jurisdiction to restrain a creditor. If, however, on every application of this nature, I were to allow creditors to appear and oppose the petition, there would be no limit to the costs which might be occasioned. The case is one of first impression, and, therefore, I shall give no costs; but I am of opinion that a creditor is not entitled to appear.

Order made for winding up the Company.

8 Ca D 202

LANGRIDGE v. PAYNE.

THIS bill was filed by a mortgagor, to restrain an ejectment by the mortgagee.

The mortgage was in common form, and dated the 18th of October, 1861. The principal money and first payment of interest fell due under the covenant on the 18th of April, 1862.

On the 15th of January, 1862, an agreement in writing was signed by the solicitors of the mortgagee and mort-

gagor shortly afterwards, after giving notice that he was no longer bound by the agreement, demanded and received payment of the interest and incidental costs:—*Held*, that this was a waiver of the default; and injunction granted to restrain an ejectment brought within the two years.

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RETRETOIL
AND MESSEUR
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COMPANY.
Judgment.

July 10th.
Mortgagor and
Mortgagee—
Stipulation for
Performance of
Covenant—
Receipt of In-
terest—Waiver.

Agreement in
writing not to
call in a mort-
gage for two
years, the mort-
gagor fulfilling
his covenants.
On one occa-
sion within the
two years in-
terest was not
paid on the day,
and the mort-

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Statement.

gagor on behalf of their respective clients. By the third clause of this agreement it was provided, that the mortgagee should not call in the money within two years from the date of the agreement, the mortgagor fulfilling his covenants. On the 18th of April, 1862, the mortgagor having forgotten that the interest was due failed to make a tender, and was served on the 21st with a notice by the mortgagee's solicitor, requiring payment of the principal and interest moneys. There were some subsequent interviews between the mortgagee's solicitor and the mortgagor; and on the 9th of May following the mortgagee's solicitor sent the mortgagor a letter, stating, that in consequence of the mortgagor's having failed to pay the interest on the day it was due, the mortgagee would not be bound to continue the security for the two years previously stipulated for, but would exercise at his discretion whatever rights he might be entitled to as mortgagee; and the letter went on to request payment to the bearer of the sum of £15 for the half year's interest, and the sum of £1 : 11 : 10 for costs of the above-mentioned notice. These payments were accordingly then made.

On the 26th of May, 1862, the mortgagee issued his writ in ejectment. The mortgagor's solicitor thereupon wrote to the mortgagee's solicitor, stating that arrangements had been made to pay off the mortgage. Notwithstanding this, the mortgagee on the 10th of June filed his bill of foreclosure; and after some correspondence the bill in this suit was filed on the 3rd of July following.

The Plaintiff insisted that the subsequent receipt of the interest was a waiver of the default made in non-payment of interest on the 18th of April, and that the Defendant was bound by the agreement to allow the money to remain for the stipulated period of two years. The Defendant con-

tended that he was no longer bound, as the mortgagor had made one default in fulfilling his covenants.

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Argument.

Mr. Rolt, Q.C., and Mr. F. H. Colt, for the Plaintiff, mentioned the case of *Demarue v. Royant* (a), before Vice-Chancellor Wood, 12th March, 1858, on the question of waiver; and *Husband v. Davis* (b), on the question of payment.

(a) *Demarue v. Royant*. Bill by mortgagor, stating indenture dated 23rd February, 1857, between Plaintiff and Defendant, whereby, after reciting that Plaintiff was indebted to Defendant, who had agreed to give time on having payment secured by the assignment therein contained, and collaterally by four joint and several promissory notes of Plaintiff and two sureties, at six, twelve, eighteen, and twenty-four months, the Plaintiff assigned certain furniture, subject to redemption if the Plaintiff should take up, honor, and pay the said several promissory notes, and each and every of them, when and as the same should respectively become due. Proviso, that in case Plaintiff should make default in payment and honoring of any of the notes when due and payable, it should be lawful for Defendant to seize and sell the premises; and that until default should be made in payment and due honoring of the said promissory notes, or any or either of them, contrary to the provisions for redemption and covenant for payment aforesaid,

it should be lawful for the Plaintiff to enjoy without interruption.

The second note was not paid on the day it fell due, the 26th February, 1858; but a tender of the amount, in post-office orders in which the Defendant's name was incorrectly stated, was made on the following day and refused, and an action was immediately commenced on the note, and settled by payment of the debt and costs, for which a receipt was given, with the words added, "without prejudice to Mr. Royant's rights under the bill of sale."

On the 8th of March the Defendant took possession of the furniture.

The bill was filed for an injunction on the 12th of March, 1858.

An injunction was granted without prejudice to any question in the cause, restraining the Defendant from continuing in possession of or selling the premises, unless and until default should be made in paying the remaining notes, until the hearing or further order.

(b) 10 C. B. 645.

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 —————
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 —————
Judgment.

Mr. *Shebbeare*, for the Defendants, cited *Edwards v. Martin (a)*.

The VICE-CHANCELLOR held that the default had been waived, and granted an injunction to restrain the ejectment until the hearing, on the Plaintiff's undertaking to abide by any order the Court might make as to judgment in the action, at the hearing or otherwise.

(a) 25 L. J., Ch., 284.

June 28th &
 30th.

*Will—Con-
 struction—
 Power—Exe-
 cution.*

Testamentary power to appoint a trust fund among all or any of donee's children. Bequest by donee as follows: "all my personal estate upon trust to pay all just debts and funeral expenses; to pay to my daughter *E.* £19; and to my daughter *J.* the whole of my furniture and household effects; and as to my money in the funds, and all my residue of my personal estate" upon further trusts for the benefit of *J.*

MATTINGLEY'S TRUSTS.

UNDER a settlement of the 9th of November, 1848, *Robert Mattingley* had a testamentary power to appoint a trust fund among all or any of his children. He made his will, dated the 29th of June, 1861, which, after appointing executors, proceeded as follows:—"I give them all my personal estate, in trust to pay all just debts and funeral expenses. To pay to my daughter *Eliza* the sum of £19, and to my daughter *Jane* the whole of my furniture and household effects. And as to my money in the funds and all my residue of my personal estate, upon further trust to invest

At the date of the will and of the death, the testator had no money in the funds, and the trust fund consisted of a sum of Consols:—*Held*, that the will was not an appointment.

and pay the income to my daughter *Jane* for her sole and separate use, free from the control of her husband.

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Statement.

The testator died on the 4th of August, 1861. The trust fund consisted, at the date of the will and of the death, of £344 8s. Consols, and the testator had not, at either of these dates, any money in the funds of his own.

The fund was paid into court, and the case now came on upon the petition of the testator's daughter *Jane*.

Mr. *Fischer*, for the petitioner.—The words “all my money in the funds” would have constituted a specific bequest if the testator had had any such property; and, therefore, though the power is not referred to, the bequest must be taken to point to the trust fund: *David's Trusts* (a), *Walker v. Mackie* (b), *Webb v. Honnor* (c), *Sugden on Powers* (d).

Argument.

Mr. *Lindley* and Mr. *Bagshawe*, for the respondents, were not called upon.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

June 30th.

I have considered the authorities upon this matter, and I do not think it necessary to hear the respondents. The case falls within the class represented by *Webb v. Honnor*, and not within that of which *Walker v. Mackie* is an example.

Judgment.

The point to be ascertained in all these cases is, whether

(a) Johns. 495.

(c) 1 Jac. & W. 352.

(b) 4 Russ. 76.

(d) 7th ed. p. 374.

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MATTINGLEY'S
TRUSTS.—
Judgment.

the testator points to a specific fund in existence, or is merely enumerating the different particulars of which he supposes that his property may consist at his death. I think the words of this will favour the latter view. He gives a pecuniary legacy to his daughter *Elizabeth*, and then bequeaths his furniture and other particulars to his daughter *Jane*, and proceeds thus: "As to my money in the funds and all my residue of my personal estate," upon certain further trusts for the benefit of his daughter *Jane*.

There is a pecuniary legacy to the other daughter, as in *David's Trusts*; but this is of no great importance here, inasmuch as the power is exclusive, and not merely distributive, as in *David's Trusts*.

If I held that the specific fund was pointed at, it would follow that the words "my money in the funds" would not pass any after-acquired property of this description. The more reasonable construction is, to hold the descriptive words as indicative of what the testator considered his personal estate might consist of at his death, and not as pointing to a specific fund in esse. *David's Trusts* turned upon very special phraseology in the will. I think the present case belongs to the other class; and I must hold that the will did not operate as an appointment.

17 Eq. 408.
36 Ch D 160, 632

GYETT v. WILLIAMS.

1862.

HUGH MORGAN PRICE, by his will, dated the 5th of October, 1853, directed that all his just debts and funeral and testamentary expenses should be fully paid and satisfied by his executors thereafter named, out of his personal estate, as soon as conveniently might be after his decease; and he gave and bequeathed unto the Defendants, *Thomas Morgan Williams, Dantsey Sheen, Elizabeth Gyett, and Matilda Bedward*, their executors, administrators, and assigns, all his moneys, securities for money, debts, and other personal estate and effects whatsoever and wheresoever, Upon trust, that they should (after satisfying his debts and funeral expenses as aforesaid,) lay out and invest, with all convenient speed, the sum of £2,000, part of his said estate, in the purchase of some eligible freehold estate in *England or Wales*, at their, his, or her discretion; and should pay and apply the rents and profits of such estate to his the said testator's brother *John Price* the elder, for and during the term of his natural life; and, from and after his decease, he gave and devised the said estate to *John Price* (the eldest son of the said *John Price* the elder), his heirs and assigns; but in case the said *John Price* the younger should depart this life before his said father, or die before attaining the age of twenty-one years, then the said testator gave and devised the said estate unto and equally between his the said *John Price* the younger's brothers, the Defendant *William Price* and *Hugh Price*, their respective heirs and assigns, as tenants in common; And upon trust that his the said testator's said trustees or trustee should, with all convenient speed, lay out and

April 27th &
30th.

Will—Residuary Devise
—Implied
Charge of Real Estate—
Priority.

On a bequest of all testator's personal estate, upon trust to lay out £2,000 in the purchase of an estate to be held on certain trusts, and upon trust to invest the residue of the personal estate and stand possessed of £1,500, part of testator's said estate, on certain trusts, and various other sums described as further parts of his said estate upon other trusts, followed by bequests of pecuniary legacies simpliciter, and a concluding gift of all the residue and remainder of testator's estate and effects, whatsoever and wheresoever, and whether in possession, reversion, remainder, or expectancy:—

Held, that the residuary clause passed the real estate charged with the pecuniary legacies, but not charged with the gifts directed out of the investment of the personal estate. *Greville v. Browne* distinguished.

Held, also, that the £2,000 was to be set apart in priority to the other gifts.

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 —
 Statement.

invest the residue of the said moneys, securities for money, debts, and other personal estate, in their, his, or her names or name, in the parliamentary stocks or public funds of *Great Britain*, or at interest on freehold or leasehold securities in *England* or *Wales*. And he thereby declared that the said trustees or trustee for the time being should stand possessed of the said trust moneys, and the stocks, funds, and securities in which the same should be invested, and the interest, dividends, and annual produce thereof, upon and for the trusts, intents, and purposes thereafter expressed and declared of and concerning the same, that is to say, upon trust, as to and concerning the sum of £1,500 part of his said estate, to pay the dividends, interest, or annual produce of the same to his (testator's) father *John Price* for life; and after his decease, leaving his then wife *Elizabeth* him surviving, then as to £500, part thereof, to pay the dividends, interest, or annual produce of the same to the said *Elizabeth Price* for her life; and as to £1,000, residue thereof, to pay and divide the same in equal proportions between all the children of the said *John Price* the father and *Elizabeth Price*. But in case the said *John Price* the father should survive the said *Elizabeth Price*, he directed, that, at the death of the said *John Price* the father, the whole sum of £1,500 should be divided in equal proportions between the last named children. And as to and concerning the sum of £1,000, other part of his said estate, upon trust to pay and apply the dividends, interest, or annual produce of the same to or for the benefit of the Defendant *William Price* for his life; and from and after his decease, to pay and transfer the said sum as the Defendant *William Price* might by will appoint; and, in default of appointment, then upon trust to pay and divide the same sum in equal proportions between all the children of the Defendant *William Price*; and if no child of *William Price*, then

upon trust to pay and divide the said sum in equal proportions between all the brothers of *William Price* who should survive him. And as to and concerning the sum of £3,000, further part of his said estate, upon trust to pay and apply the dividends, interest, or annual produce of the same to and for the education and bringing up of the children of the said *John Price* the elder (except the said *John Price* the younger and *William Price* whom he had thereinbefore provided for). And when and so soon as the said children should have attained their respective ages of twenty-one years, he gave and bequeathed the said principal sum of £3,000 to be divided between them in equal proportions. And as to and concerning the sum of £3,000, further part of his estate, upon trust to pay the dividends, interest, or annual produce of the same to the Defendant *Elizabeth Gyett* for her sole and separate use during her natural life; and from and after her decease, upon trust to pay and divide the said sum in equal proportions between her two daughters, *Elizabeth Gyett* and the Plaintiff *Annie Gyett*; but if only one of such daughters should survive his said sister, then the whole of the said sum to such survivor; and if neither of the said daughters should survive his said sister, then upon trust to pay and transfer the said sum to the Plaintiff *William Gyett*, son of his said sister. And as to and concerning the sum of £4,000 further part of his said estate, upon trust to pay and apply the dividends, interest, or annual produce of the same at the sole discretion of the Plaintiff *Elizabeth Gyett*, to and for the maintenance, education, clothing, and bringing up of her son the Plaintiff *William Gyett*. And on the Plaintiff *William Gyett* attaining twenty-one, he gave and bequeathed the said sum of £4,000 to him absolutely; but should the said *William Gyett* depart this life before attaining the age of twenty-one, he directed and declared that the dividends, interest, or annual produce of the said

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principal sum should belong and be paid to the Defendant *Elizabeth Gyett* for her life, for her sole and separate use. And from and after her decease, he gave and bequeathed one moiety of the said principal sum unto and equally between all the children of the Defendant *Elizabeth Gyett*; and the remaining moiety unto and equally between all the children of the said *John Price* the elder. And he directed and declared that a sufficient sum, further part of his said estate, should be invested by his said trustees, to produce a clear annuity of £12 sterling, which they should pay to his aunt, Mrs. *Eleanor Phillips*, during her life, for her separate use; and from and after the decease of the said *Eleanor Phillips*, he gave and bequeathed the said annuity of £12 to her husband *Edward Phillips*, for his life; and from and after his decease, he gave and bequeathed one-third portion of the said principal sum unto and equally between all the children of the said *Eleanor Phillips* who should be living at the time of her decease. And the remaining two-thirds of the said principal sum he gave and bequeathed unto and equally between all his brothers of the half blood who should be living at the time of the decease of the said *Eleanor Phillips*. And the said testator gave and bequeathed unto his cousin *Elizabeth*, the wife of *John Price*, the sum of £100. And he nominated and appointed the Defendants, *Thomas Morgan Williams*, *Dantsey Sheen*, and *Elizabeth Gyett*, and the said *Matilda Bedward* executors of his said will, and he gave and bequeathed unto each of them the sum of £150, as an acknowledgment for the trouble they might have in the execution of the trusts of his said will; and he directed that the same should be paid to them, notwithstanding they might decline to prove his said will or to act in the execution of the trusts thereof. And after a receipt clause in common form, the will proceeded thus:—"And as to and concerning all the residue and remainder of my estate

and effects, whatsoever and wheresoever, and whether in possession, reversion, remainder, or expectancy, I give and bequeath one moiety or equal half part thereof unto and equally between all the children of the said *John Price* the elder, to be a vested interest on each child's attaining the age of twenty-one years. And I give and bequeath the remaining moiety or equal half part thereof unto and equally between all the children of the Defendant *Elizabeth Gyett*, to be a vested interest on each of such children attaining the age of twenty-one years."

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The testator died on the 20th day of September, 1859, leaving the said *John Price* the elder, his heir-at-law.

The Defendant *Elizabeth Gyett* had three children, the Plaintiffs in this suit.

The questions argued were the following :—

1. Whether the residuary clause passed the real estate.
2. Whether the realty was charged with the legacies.
3. Whether the £2,000 directed to be laid out in land took priority over the other gifts.

The argument was first heard on the contest of the heir.

Mr. *Field* (Mr. *Rolt*, Q.C., with him) for the Plaintiffs.

Argument.

Mr. *James*, Q.C., and Mr. *Rendall* for the heir-at-law :—

1. The realty does not pass by the residuary clause. The word 'estate' would, in general, be sufficient; but here the testator has throughout spoken of his personal estate by the term "my said estate." The word 'bequeath,' and not 'devise,' is used, and the word 'estate,' unless coupled with 'devise,' is not sufficient to pass realty :—

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Woollam v. Kenworthy(a), Pogson v. Thomas(b), Coard v. Holderness(c).

2. The £2,000 is first to be set apart, and then the legacies to be paid out of the residue of the personal estate.

The VICE-CHANCELLOR intimated his opinion that the real estate passed by the residuary clause; and the argument proceeded on the other points.

Mr. Field.—The legacies generally are charged on the real estate. Where you have a gift of legacies, and then a gift of the residue of the real and personal estate, a charge is necessarily implied: *Bench v. Biles(d), Francis v. Clemow(e), Wheeler v. Howell(f).*

Mr. Willcock, Q.C., and Mr. Whately, in the same interest:—

Greville v. Browne(g) is quite conclusive as to the charge of legacies. The £100 and £150 are charged, and the previous gifts must follow the same rule.

[They also cited *Thwaites v. Foreman(h), Minor v. Wicksteed(i), Eavestaff v. Austin(j), Dunboyne v. Brander(k), Haslewood v. Green(l), Haynes v. Haynes(m).*]

The £2,000 takes priority. It is directed to be first set apart, and then the residue only of the personalty to be invested.

- (a) 9 Ves. 137.
- (b) 6 Bing. N.C. 887.
- (c) 20 Beav. 147.
- (d) 4 Madd. 187.
- (e) Kay, 435.
- (f) 3 K. & J. 198.
- (g) 7 II. L. Cas. 689.

- (h) 1 Coll. 409.
- (i) 8 B. C. C. 627.
- (j) 19 Beav. 591.
- (k) 18 Beav. 313.
- (l) 28 Beav. 1.
- (m) 3 D. M. G. 590.

Mr. *Giffard*, Q.C., and Mr. *Blackman*, Mr. *Jessell* and Mr. *Daune*y, for other Defendants, argued that the legacies were not charged, with the exception of the legacy of £100, and the executors' legacies of £150 each. These legacies alone were given generally, and the subsequent gift of "the residue" of the realty raised an implied charge as to them. But the £2,000 and the other bequests were only given by a direction to set apart personalty for the purpose; and the word 'residue' having been satisfied by charging the first-mentioned general legacies, there was no ground for implying a charge contrary to the directions of the will as to the rest.

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On the question of priority they cited *Blower v. Morret*(a), and *Lewin v. Lewin*(b).

Mr. *Nalder*, and Mr. *Babington*, for other parties.

Mr. *Field*, in reply, referred to *Wheeler v. Howell*(c).

VICE-CHANCELLOR SIR W. PAGE WOOD:—

April 30th.

There is only one question upon this will which left any doubt upon my mind. Three points were argued:—first, whether there was any gift at all of the realty; secondly, whether, if so, the sums given out of the personalty were charges upon the real estate; and lastly, whether the gift of £2,000 took priority over the other gifts out of the personal estate.

Judgment.

As regards the first point, I was surprised that any doubt could be entertained, that a testator, who, after disposing of his personal estate, makes a gift in this form, "I bequeath all the residue of my estate and effects," does by these

(a) 2 Ves. Sen. 420. (b) 2 Ves. Sen. 414. (c) 3 K. & J. 198.

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words pass realty as well as personalty. There are no words such as 'executors, administrators, and assigns' to restrict the generality of the gift, as there have been in some of the cases on the subject. The use of the word 'bequeath' affords no solid argument to exclude the realty, the general words being of the largest possible kind; and to give it any such effect would, in many cases, altogether frustrate a testator's intentions. The cases cited were all of one of these two classes: either cases where the testator, after disposing of certain specified personal property, goes on to add general words, which are, therefore, restricted, on the principle *noscitur a sociis*; or else cases where the gift, being to A., his executors and administrators, or the like, is thereby held to be limited to personalty. The will before me falls under neither of these classes. It was suggested that the testator had no real estate at the date of his will; but since the Wills Act, no argument can be founded on that circumstance, because after-acquired realty would pass; and though possibly, if the testator had been asked if he meant to pass real estate, he might have said "No," it is just as probable that, if asked whether he meant to die intestate as to after-acquired realty, he would have replied in the negative to that also. *Doe v. Langlands* (a) is a much stronger case than this; for there the words were, "property, goods, and chattels," and these were held sufficient to pass realty. Here the testator makes limitations of the personalty, which may possibly exhaust it, and then gives all the residue of his estate and effects, which must include the real estate, no part of which had before been devised.

The substantial question is, whether this realty is charged with all the gifts and trusts previously made and created out of the personal estate, or whether the peculiar form of these

(a) 14 East, 370.

gifts takes the case out of the rule settled by the House of Lords in *Greville v. Browne*.

For the moment I will put out of consideration the special legacy of £100, and the executors' legacies of £150 each, and confine myself to the other parts of the will.

There is, first, a direction for payment of debts out of the personal estate; then a bequest (not, of course, necessary) of all the personal estate to the executors and trustees; next a direction to these trustees to lay out £2,000 in the purchase of a freehold estate, to be held on certain trusts; after this a direction to invest the residue of the personal estate on the trusts declared of the same. The trustees, therefore, are, first, to lay out the £2,000, and then to invest what remains of the personalty. The trusts of this last investment are, as to £1,500, part of his said estate, to pay the income to testator's father, and, after his decease, as to £500, to pay the income to his mother; and as to the remaining £1,000, or if the father should survive his wife, then, as to the whole £1,500, to divide the same between their children; and as to a further sum of £1,000, further part of his said estate, to apply the same upon certain trusts for *William Price* and his children, with an ultimate trust, if there should be no children, to divide the same among the brothers of *William*; and after declaring the trusts in like manner of other parts of his said estate—viz. £3,000, £3,000, and £4,000—he directs that a sufficient sum, further part of his said estate, shall be invested by the trustees to produce an annuity of £12, to be paid to *Mrs. Phillips* for her separate use, and after her decease, he bequeaths the said annuity to her husband for life, and after his decease he disposes of the said principal sum.

After all these provisions, he gives a legacy of £100 to *Elizabeth Price*, and legacies of £150 each to his exe-

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cutors; and then, after a receipt clause, follows the residuary clause, "As to and concerning all the residue and remainder of my estate and effects whatsoever and where-soever, and whether in possession, reversion, remainder, or expectancy, I give and bequeath" one moiety among the children of *John Price*, and the remaining moiety among the children of *Elizabeth Gyett*.

If the case were relieved from the embarrassment caused by the special legacies of £100 and £150, it would be clear to my mind that the rule in *Greville v. Browne* could not affect it. The view taken in that case was, that, but for the preference shown to the heir, it would be clear to common sense, that if a testator gives certain legacies, and then gives the remainder of his real and personal estate, he must contemplate the payment of these previous gifts before the rest of his estate is disposed of. But does this principle apply to a case where the testator first deals exclusively with his personal estate, and allots it out among different objects of bounty, and then disposes of the residue of his real and personal estate? Such a case is quite different from one where legacies are given generally, and not merely as payments directed to be made out of a fund derived exclusively from personal estate. *Greville v. Browne* has no application to such a disposition as I have described.

This will is much more near to the case put in argument of a gift of *Blackacre*, with a direction to pay thereout certain sums of money. The scheme of the will throughout is, that the several gifts are to be provided out of nothing except the personal estate, and if that specific fund is insufficient, they must abate in proportion accordingly. No inference, therefore, arises from the subsequent residuary devise like that which was drawn in the case of *Greville v. Browne*.

The only difficulty which presses on my mind arises from the particular legacies which are given, not as aliquot parts of the personal estate, but simpliciter as legacies. There can be little doubt, I apprehend, that the specific sums allotted out in the first instance do not take priority over the pecuniary legacies which follow; and, therefore, although he has apportioned what he seems to consider as his whole personal estate, the testator proceeds to make other gifts payable out of personal estate, which so far disturbs the scheme of the earlier portion of the will. My only doubt has been whether this circumstance does not bring the whole will within the principle of *Greville v. Browne*. With respect to these legacies themselves, I think I must hold them to fall within the scope of *Greville v. Browne*, and to be charges on the realty.

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A case of *Minor v. Wicksteed* was relied upon as an authority for treating all the gifts as charges on the realty; but the question there was merely on the construction of a positive charge. *Greville v. Browne* rests upon an inferential charge, derived from the gift of the residue of real and personal estate after certain previous gifts. In this case certain gifts are made, and all the residue of the personalty is portioned out to be invested for the benefit of tenants for life, with gifts over of the capital. It is impossible to say that the principle of *Greville v. Browne* does not apply to the general legacies of £100 and £150; and it is argued that it is incredible that the testator should have provided for the smaller legacies by making them payable out of the realty, without making a like provision for the larger legacies also. If, therefore, the rule of *Greville v. Browne* is applicable to any of the legacies, it must, it is contended, apply to all. The answer to this is, that one set of legacies is given in a form to which the principle of *Greville v. Browne* directly applies, while the others are not so. I cannot alter the construction

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on any mere conjecture as to what the testator was likely to do. That the testator did not foresee all the consequences of the dispositions he made, is no ground for interfering with those which he did foresee, and as to which he declared his intention.

Then, upon the question of priority, the case is distinguishable from *Thwaites v. Foreman*. There the directions were, in the first place, to pay a debt, then to set apart an annuity fund, and, in the next place, after making such investment as aforesaid, to pay legacies; and it was held that the words did not show an intention to give priority, but merely indicated the order in which, as a matter of arrangement, the different subjects were dealt with. The words were read, not as pointing out the order of execution of the trusts, but the order of enumeration only. On the language of this will, even if it were not covered by authority, I think there is no doubt as to the legitimate construction. When a man directs £2,000 to be laid out in purchasing an estate, and then, after disposing of that estate, directs that the residue of his personal estate is to be invested, and portioned out in a particular way, what is it that he gives by this last disposition? Clearly nothing except the residue so to be invested, after payment of the £2,000. The substance of the gift is such that the language cannot be regarded as pointing to the mere order of enumeration, but must be read as giving priority. The onus, no doubt, is on those who claim priority, but in this case I think it is satisfied.

There will, therefore, be a declaration that the real estate passed by the residuary clause; that the legacies of £100 and £150 are charged upon the realty; and that the gift of the sum of £2,000 directed to be laid out in the purchase of an estate, takes priority over any investment of the rest of the personal estate.

It is unnecessary to make any negative declaration that the other trusts of the invested personalty are not charged on the real estate.

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RE PHOENIX LIFE ASSURANCE COMPANY :

1149 69 1149 324. BURGESS AND STOCK'S CASE.

THE *Phoenix Life Assurance Company* was formed under the Joint Stock Companies Act (7 & 8 Vict. c. 110), under a deed of settlement, dated the 5th May, 1848, in which the business of the Company was stated to be life assurance.

July 10th & 11th. 94th 5.
Joint Stock Company—Extension of Objects—Dealings ultra Vires—Acquiescence—Liability.

At an extraordinary general meeting of the Company, on the 11th March, 1857, it was resolved that the business should extend to granting assurances against death, injury, casualty, or accident by sea or land; against loss or damage to property of any kind whatsoever and wheresoever, by lightning, hail, hurricane, blight, or any other causes, means, or contingency; and to other matters.

A joint stock company was formed under a deed describing its business as life assurance. Resolutions of extraordinary general meetings were regularly passed and confirmed for extending the business to marine insurance. The marine business was mentioned in the annual returns to the Registry-office, and referred to in reports and circulars, and on one occasion a report on the marine business was sent out

The said resolutions were duly confirmed at a second meeting, on the 27th May, 1857, and were registered on the 16th April, 1858.

In the year 1858, the Company commenced insuring marine risks, and established branch offices for that purpose; and on the 13th November, 1858, and subsequent

with the dividend warrants. A deed extending the purposes of the Company to sea risks was executed by some only of the shareholders; but it did not appear that any shareholder had objected to the marine business being carried on. About one and a half years after the commencement of the marine business the Company was wound up:—*Held*, that there was no such acquiescence by the shareholders as to entitle the holders of marine policies to prove in respect of them.

Held, also, that the premiums paid might be proved against the Company.

Semble, the business of a joint stock company cannot be extended beyond its original objects as defined by the deed of settlement, except by a supplemental deed executed by all the shareholders.

The Creditors' Representative cannot be heard to support the claim of a class of persons to rank as creditors.

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dates, issued policies on various vessels to Messrs. *Burges* and *Stock*, on some of which losses occurred. Before this date reports and circulars were issued, announcing to the shareholders the establishment of the marine branch of the business, and otherwise referring to it; and on one occasion a report of this kind was circulated, together with the dividend warrant; but the warrant itself did not contain any reference to marine business, either in the title of the Company or otherwise.

A supplemental deed, dated the 30th March, 1859, embodying the alterations in the business, was executed by some, but not by all, of the shareholders, and the annual returns in and after 1859, filed at the Registry Office, stated that the business of the Company included marine insurance.

On the 24th March, 1860, it was resolved to wind up the Company; and on the 27th March the supplemental deed was registered.

Messrs. *Burges* and *Stock*, on the 12th December, 1859, and the 6th and 18th February, 1860, recovered judgments by default on bills of exchange accepted by the Company for £395 1s. 6d., £417 19s. 3d., and £89 10s. and costs. The Company had power by the original deed to accept bills.

On the 14th April, 1860, an order was made, on the petition of the directors, for winding up the Company.

It did not appear that any shareholder had objected to the carrying on of marine business.

The case now came on upon the claim of Messrs. *Burges* and *Stock*, to prove against the Company for the amount of their claims on marine policies, and also for the amount of the judgments.

Mr. *Giffard*, Q.C., and Mr. *J. Russell* (of the common law bar), for *Burges* and *Stock* :—

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All the shareholders acquiesced in the marine business after the fact of its commencement had been made known by circulars and by the opening of marine branch offices. They cannot, therefore, now dispute claims arising out of marine policies, as being beyond the scope of the original deed.

A joint stock company is not in the same position as a company constituted by a special Act of Parliament. In the latter case the powers given cannot be exceeded, but the shareholders in an ordinary joint stock company have power to enlarge the scope of the business at pleasure.

The statute 7 & 8 Vict. c. 110 distinctly contemplates this, by requiring annual returns of the nature of the business carried on (sects. 10, 14).

The statute requires no supplemental deed for this purpose; and that the change was in fact made without opposition from a single shareholder is not disputed. There was the assent of all the shareholders, and that alone is required.

It is true, the supplemental deed was never fully executed, but this was not essential. If assent could not be otherwise given, the consequence would be, that any company might advertise and register itself as carrying on a particular business, and after receiving money on that footing from the public might repudiate all its liabilities, and this although the extension of the business was known to and approved by the whole body of shareholders. Having had the benefit of the marine business, the Company cannot repudiate the consequent obligations: *Re Magdalena Steam Navigation Company(a)*.

(a) Johns. 690.

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Further, we have judgments and are entitled to prove on them. The judgments on the face of them were given for bills of exchange, and there is nothing in the evidence or admissions to show that they were founded on the marine policies, nor can the Court look behind the judgments: *Hulett's Case* (a). At any rate, we are entitled to recover the premiums paid.

Mr. *Kay*, for the Creditors' Representative, proposed to support the claim of the marine policy holders, who were very numerous, and all of whose claims were by arrangement to follow the issue of the present claim. He referred to the 1st section of the 20 & 21 Vict. c. 78 by which all creditors who had proved or lodged affidavits were to be represented by the Creditors' Representative.

The VICE-CHANCELLOR held that a Creditors' Representative could not be heard to support the claim of any class of persons to be admitted as creditors. He must represent the common interests of the creditors generally.

Mr. *Fry* (Sir *H. Cairns*, Q.C., with him), for the Official Manager, was called upon only on the points as to the judgments and bills of exchange, and as to the recovery of premiums.

The Court can look behind the judgments, and this was done in the Bankruptcy Court on a petition for adjudication against this Company. There is no doubt that the bills were accepted for marine losses, and this appears on the Company's books; and, though they may not strictly be evidence for this purpose, the fact can easily be proved.

As to the premiums, they can only be recovered on

(a) *Ante*, p. 306.

the ground of mistake: *Kelly v. Solari* (a). Mistake of law would not suffice, and mistake of fact is excluded by the means of knowledge which the claimants had of the nature of the business which was authorised by the deed of settlement.

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Mr. Giffard in reply:—

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You may recover on a mistake in law: *Re Saxon—Anchor Case* (b). If we had found out the illegality the day after the policies were issued, we could certainly have recovered the premiums, and the right cannot be altered by the event. A company is always bound to the extent of money actually received and applied for the benefit of the company, notwithstanding it may have been paid on a contract which turns out to be ultra vires. It could be recovered at law for want of consideration, as money had and received.

[Mr. James, Q.C. (amicus curiæ), mentioned the case of *Hall v. Mayor of Swansea* (c), where this had been done.]

The judgments can only be disputed on a bill to set them aside.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This is a case of extreme importance; but it is one in which the Court cannot interfere, as asked, in favour of the claimants.

Judgment.

The question is, whether a company, established for life assurance, is competent to grant marine policies, on the ground that the shareholders—though they have not executed a supplemental deed for the purpose of giving this power—have acquiesced to the extent which is admitted in

(a) 9 M. & W. 54. (b) Ante, p. 408. (c) 5 Q. B. 526.

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this case. It has been argued, that there is no illegality in a joint-stock company extending or otherwise changing the scope of its business; and undoubtedly that may be done by means of a supplemental deed. Such a deed was prepared in this case; but it was only executed by a portion of the shareholders, and the other proprietors do not appear to have done anything sufficient to bind them all to the new course of business, beyond the scope of the original deed of settlement.

It is not necessary to mention the familiar authorities which show that if there is but one dissentient shareholder, the assent of all the others would not give validity to such a change in the constitution of the company. The Joint-Stock Companies Act requires the title, purposes, and objects of a company to be defined and registered. The object of this, as was held in *Ernest v. Nicholls* (a), is not only for the benefit of those who deal with the company, but for the protection of the shareholders, in order that they may know what the obligations are to which they have subjected themselves. It would be difficult to hold that the purposes and objects of the Company, as defined by their deed of settlement, and placed on the registry, could be changed by anything less formal than the deed by which the shareholders' liabilities are defined, even if all the proprietors were brought together, and each one declared his assent to the change. But nothing approaching to this is alleged. All that appears is, that certain reports and circulars were issued by the directors, in which the marine business was mentioned; that one of these reports accompanied the dividend warrants; and it is said, that every shareholder who received these reports with his dividend is precluded from disputing the regularity of the marine business. Now, considering that many of the shareholders may and almost must have been under disability, it

(a) 6 H. L. Cas. 401.

would be impossible to say that the whole body must be bound by the communication of this report. It is urged, that if any shareholder takes his dividend, and at the same time knowingly suffers a report to be circulated for the express purpose of deceiving all mankind as to the nature of the business of the Company, he is bound to make good the representation. But, apart from the probable disability of many of the shareholders, there is nothing here to prove sanction or even knowledge. It does not follow that every shareholder who received a dividend warrant and a report at the same time—not forming parts of the same document—would read the report, and thereby inform himself of the fact that the Company had embarked in a business not authorised by the deed of settlement. Such an assumption would be the most frivolous ground imaginable for holding a body of shareholders liable. If a case should ever arise of all the shareholders in a company continuing for years to take the profits of an illegal business, with full knowledge of what was being done, it will be soon enough then to decide it. In this instance the illegal business was only commenced a year and a half before the winding up of the Company, and only one dividend was paid in the interval; and this certainly affords no sufficient ground for the presumption that every shareholder accepted his dividend with knowledge of the character of the business which was being carried on. It is not necessary, therefore, to inquire whether there were not some shareholders under disability, though there can be little doubt what the result would be; and, in fact, I see on the list the name of a person in *Australia*, who may very probably have had no opportunity of intimating his dissent from the course taken by the directors. It would be idle, however, to put the Company to the expense of an inquiry of this kind, for, even if I had proof that every shareholder took his dividend after receiving the letter which contained the report of the establishment of the marine business, I could not hold

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that he had thereby bound himself to all the liabilities which might result from that extension of the business of the company.

The claimants, therefore, will not be allowed to prove for losses upon marine policies; but there is nothing to impeach the bills of exchange or the judgments upon them, and to that extent the proof must be allowed; but without prejudice to any steps which the official manager may take to set aside the debt.

With respect to the premiums, I incline to think that the amount paid in respect of them may be proved; and unless I find that there is any authority to the contrary, I shall so decide.

The Creditors' Representative will have the costs of a simple appearance only.

July 23rd.

VICE-CHANCELLOR SIR W. PAGE WOOD.—

There is one point as to to which I reserved my judgment—viz., whether Messrs. Burges and Stock are entitled to prove for the amount of the premiums paid by them. It appears from the proceedings that the total amount of premiums received falls far short of the total payments made in respect of the marine business, but this cannot affect the rights of these claimants. They have had no consideration for the premiums they paid. The Directors, it is true, had no power to issue marine policies, but they had power to receive money, and apply it for the benefit of the Company. It is proved that they did so receive and apply these premiums, and the amount might have been recovered, even at law, as money had and received. The proof must therefore be allowed for the amount of the premiums paid.

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HEPTINSTALL v. GOTT.

JOSEPH GOTT made his will, dated the 26th October, 1859, which, so far as material, was as follows:—

"I give and bequeath upon trust unto *R. Heptinstall* and *T. Livesay* all my real and personal estate wheresoever or whatsoever, to dispose of the same in the following manner and form—that is to say, first, I give to my daughter, *Sarah Gott*, my four freehold cottages, situated at *Ardsley*, near *Wakefield*, subject to a charge of £150." Then followed a gift among certain children and grandchildren, including *Sarah*, of all the personal estate. No specific disposition was made of the said sum of £150. The bill was filed by the acting executor and trustee.

July 5th & 7th.
Will—Devise
—Charge.

Devise to *A.* of specific property, "subject to a charge of £150," followed by a residuary bequest, without any disposition of the £150:—
Held, that the devisee took free from the charge.

Mr. *H. W. Buxton*, for the Plaintiff.

Argument.

Mr. *Shee*, for the heir-at-law:—

The charge being undisposed of goes to the heir: *Arnold v. Chapman* (a), *Gravenor v. Hallum* (b).

Mr. *Wickens*, for *Sarah Gott*:—

The testator intended *Sarah* to take the land, subject to providing thereout £150, for a purpose which he does not state. The charge, therefore, sinks for the benefit of the devisee.

Mr. *F. Webb* for the residuary legatees:—

The intention to be gathered from the will, as it stands,

(a) 1 Ves. sen. 108.

(b) Amb. 643.

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is simply to convert the realty pro tanto, and leave it to go under the residuary bequest.

Argument.

July 7th.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I reserved my judgment on the question, what was the effect of a devise subject to a charge, of which nothing more is said in the will. I had to consider a similar question recently, in the case of *Tucker v. Kayess* (a); but an earlier case of *Re Cooper's Legacy*, which has been affirmed on appeal (b), is more nearly in point. The principle on which I acted in that case was, that if you can ascertain from the terms of a will that a charge is meant as an exception out of a gift, there the charge will be operative, although the disposition of it may not take effect; but that, where the purpose of the charge is merely to provide for some object, and, subject to such purpose, to leave the estate to the devisee, there, if the purpose fails, the charge sinks for the benefit of the devisee.

The case which most commonly occurs is that which happened in *Arnold v. Chapman*, viz., a charge in favour of a charity, which, though the purpose failed, was held in that case not to sink for the benefit of the devisee, the testator having made a complete disposition showing an intention to except it out of the devise. But where the testator himself makes no disposition of the charge, or a disposition which does not exhaust it, the devisee takes free from the charge, either altogether or pro tanto, as the case may be.

Cooper's Trusts is, if anything, rather a stronger case than the present. There were trusts there for raising the

(a) 4 K. & J. 339.

(b) 4 D. M. G. 757.

money by sale or otherwise ; then a devise of the estate, after raising as aforesaid ; then a direction that the money should go to the daughter for life, and afterwards to her children. The daughter died without ever having had a child. If any child had ever been in existence, I apprehend that the principle of *Arnold v. Chapman* would have applied ; but it was a gift on the contingency of the daughter having children ; and this not having happened, the charge was held to sink for the benefit of the devisee. Lord Justice *Knight Bruce* says, "The law of the Court is settled agreeably to reason and good sense, that, where landed property is given by will to one set of persons, or according to one set of limitations, but is subjected by will to a pecuniary charge in favour of other interests, and those other interests given by the will do not exhaust the entire property in the money, the charge, so far as it is not given away, sinks for the benefit of those to whom the real estate is devised, subject to the charge." In the present case the money charged is given to no one, and the case therefore belongs to those where the limitations do not exhaust the charge, and not to those where there is a complete disposition which fails from its illegality or from subsequent events.

It might be thought a possible construction to consider the language as expressing an intention that the £150 shall be charged on the real estate in augmentation of the personal estate ; but I do not think any such purpose can fairly be extracted from the will. I must hold, therefore, that the £150 sinks for the benefit of the devisee, and that she takes free from the charge.

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SC on app. 28th J^y 538
affirmed
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June 2nd.

Demurrer—

Parties—

Bankrupt—

Fraud.

GILBERT v. LEWIS.

THIS case came on upon demurrer. The material averments of the bill were as follows:—

A bill was filed against a bankrupt and his assignees, seeking to set aside certain conveyances as having been fraudulently procured by the bankrupt before the bankruptcy:—
Held, on demurrer, that the charge of fraud did not make the bankrupt a proper party.

Held, also, that although a decree declaring the deeds to be fraudulent would in a sense make the bankrupt a trustee of the property, this was not sufficient to make him a proper party to the suit.

Seem, a bankrupt cannot be made a party to a suit against his assignees for the purpose of discovery.

The Plaintiff was entitled, under the will of *G. P. Bradley*, to a remainder in fee simple expectant on the death of *Phæbe Bradley*, who died in 1846; whereupon the Defendant *Hunter* entered into possession.

“The Defendants, *Hunter*, *Lewis*, and *Graham*, allege that the Defendant *Hunter* became entitled, on the death of *Phæbe Bradley*, to such possession, in manner following:”—

1. That *G. P. Bradley* and his late father had, by a deed of March, 1828, granted an annuity, secured by a term of 2,000 years, out of the property.

2. That the annuity was purchased by and assigned to the Earl of *Strathmore*, by an indenture of 2nd August, 1837, *Hunter* being trustee of the term.

3. That the term was sold to *Elkington*, under the powers of the annuity deed, by an indenture of the 4th August, 1837.

4. That by an indorsed indenture, dated the 5th April, 1841, it was recited that the purchase by *Elkington* was made with *Hunter's* money; and the term was thereby assigned to him.

The bill then charged that the whole of the said transaction was a fraudulent contrivance by *Hunter* to obtain the property without payment, and that no consideration passed.

The Defendant *Hunter* was adjudicated bankrupt on the 29th of October, 1861, and the Defendants *Lewis* and *Graham* were his assignees.

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Statement.

"The Defendant *Hunter* alleges that there will be a large surplus coming to him under his bankruptcy, after payment in full of all his creditors; and he insists, and *Lewis* and *Graham* admit, that, for this and other reasons, the said term in the said hereditaments is not vested in *Lewis* and *Graham* as the assignees under the said bankruptcy."

The Defendant *Hunter* had retained possession of the premises until the appointment of assignees; shortly after which *Lewis* and *Graham* had entered into and continued in possession.

The bill also charged that *Hunter* was in possession of the deeds.

The bill prayed a declaration, that the deeds were fraudulent and void; that they might be delivered up and cancelled, or that the Defendants, *Lewis*, *Graham*, and *Hunter*, might re-assign the premises; that the Plaintiff might be let into possession; that the Defendant *Hunter* might deliver up all deeds relating to the premises; that *Hunter* might pay the costs; and for further relief.

To this bill, *Hunter* put in an answer and demurrer, denying the possession of the deeds, and demurring to the rest of the bill.

Mr. *Rolt*, Q.C., and Mr. *Dickinson*, for the demurrer:—

Argument.

The bankrupt cannot be made a party either for relief or discovery; and, even if he could be joined for discovery, the bill is demurrable, because relief is asked against him:

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Benfield v. Salomons(a), *Lloyd v. Lander*(b), *Collins v. Shirley*(c), *Rochfort v. Battersby*(d), and *Whitworth v. Davis*(e). Further, there is no allegation in the bill, that the deeds sought to be set aside were ever executed. The transaction, moreover, is forty years old.

Mr. *Giffard*, Q.C., and Mr. *Reilly*, for the bill:—

If we succeed in setting aside the deeds, the bankrupt is found to have been a trustee of the term, which, therefore, would not pass to the assignees, although any beneficial interest did pass. On the case stated by the bill, the bankrupt still retains the trust estate, and may be sued in that character.

The bankrupt must give discovery, even though he might demur to the relief. This is so laid down in *Mitford on Pleadings*(f), and in the note it is added, that if fraud is charged, and costs prayed against the bankrupt, he cannot demur: *Hare on Discovery*(g), *Mackworth v. Marshall*(h), *King v. Martin*(i), *Fenton v. Hughes*(j), *Le Texier v. Anspaak*(k). If there is a defence, it should have been taken by plea, and not by demurrer. There is a charge in the bill that the Defendant claims an interest, and that the assignees admit it; and that is sufficient on demurrer: *Plummer v. May*(l), *Dalton v. Hayter*(m), *Boyse v. Rossborough*(n), *Plumbe v. Plume*(o). The averment that the Defendants allege that the deeds were executed, is a sufficient averment of the execution.

As to the alleged delay, it is not forty years, for the

(a) 9 Ves. 77.

(b) 5 Madd. 282.

(c) 1 R. & M. 638.

(d) 2 H. L. Cas. 388.

(e) 1 V. & B. 545.

(f) Page 161.

(g) Page 83.

(h) 3 Sim. 368.

(i) 2 Ves. jun. 641.

(j) 7 Ves. 287.

(k) 15 Ves. 159.

(l) 1 Ves. sen. 426.

(m) 7 Beav. 813.

(n) Kay, 71.

(o) 4 Y. & C. 345.

estate only vested in possession in 1846, and nothing less than twenty years is a bar in these cases.

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Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This demurrer must be allowed. The authorities cited may be disposed of by the observation that they have no reference to the point which is here in dispute. Upon a bankruptcy, it is not questioned that *prima facie* the whole interest of the bankrupt passes to the assignees; but it is said, that the bankrupt may be made a party to a suit having reference to that property, for the purpose of discovery, if not for relief. In the case of *Whitworth v. Davis*, the point was treated as at least doubtful; and the decision was against the Plaintiff on demurrer, he having prayed relief as well as discovery against the bankrupt.

Judgment.

But then the question arises, whether the bankrupt, being charged with fraud committed before the bankruptcy, can on that ground be made a Defendant to a bill seeking relief in respect of the property alleged to have been fraudulently acquired, so as to fix him with costs as an accomplice. The authorities cited for that position turn in great measure on the principle, that, where several persons join in a fraud, it is no defence on the part of any one of them to say that he individually derived no benefit from the fraud. In such a case, where the fraud enures wholly for the benefit of one of the parties to it, the others may nevertheless be made parties for costs. In *King v. Martin*, the bankrupt was held a proper party on the ground of an alleged confederacy between him and the assignees to concoct a bankruptcy, so as to defraud the Plaintiff. In *Lloyd v. Lander*, there is a dictum which hints at the possibility of making a bankrupt a party as

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an agent in a fraud, although his interest in the subject matter of the suit may have passed to his assignees. The Vice-Chancellor says, that the bill charged a fraud upon the Plaintiff by the bankrupt, and that an agent in a fraud may be made a party though he has no interest, and adds: "It is observable, however, that in the alleged fraud the bankrupt must have been the principal and not the agent." The demurrer of the bankrupt was therefore allowed. The real question on this bill is how far the Plaintiff is entitled to separate the relief, and proceed against the assignees in respect of the beneficial interest in the property, and against the bankrupt simply for costs. I do not think that any of the authorities reach this case. *Mackworth v. Marshall*, indeed, may be thought to be in point; but the judgment is given in so unsatisfactory a manner, that it is impossible to concur in the reasons which are assigned; and it is to be observed, too, that these are not the reasons which were urged in argument. The Vice-Chancellor does not say that the bankrupt, having been guilty of fraud, may be made a defendant for costs; but that certain bills of exchange (the subject of the suit) were in the hands of other Defendants, who claimed no interest in them, and that the Plaintiff would have a right to have them delivered up, except for any claim which the Defendant *Marshall* might have upon them. But, according to the plea, *Marshall* had no such claim, for any such interest would have passed to his assignees. The assignees were, therefore, the proper persons to represent that interest; and the Plaintiff, on establishing his right against them, would be entitled to have the bills handed over. The Vice-Chancellor, however, is reported to have decided that on account of this interest the bankrupt's plea ought to be overruled. I am quite unable to follow the reasoning of the judgment, and I cannot regard the case as a decision that a bankrupt who has committed a fraud before his bank-

ruptcy, and thereby acquired property which has passed to his assignees, can be brought before the Court, after the bankruptcy, as a defendant, for costs or otherwise in a suit to set aside the fraudulent transaction. There is no charge in the bill, that, since the bankruptcy, the assignees and the bankrupt have concurred in any plan for withholding the property from the Plaintiff (though I do not say that that would have sufficed); and I find no authority for the general doctrine, that a bankrupt, who has committed a fraud before his bankruptcy, is, on that ground alone, a proper party to a suit against the assignees in respect of the transaction. A further point was made, that the Defendant had not sufficiently answered the interrogatory as to the possession of the deeds mentioned in the bill; but I think the answer does sufficiently deny the possession.

Another point was raised of this kind: The Plaintiffs say, that if they succeed in setting aside the transaction which they allege to be fraudulent, the effect will be to make the bankrupt a trustee of the property *ab initio*, and, therefore, it is contended, that the bankrupt has an interest as a trustee, which did not pass to the assignees; but the answer is, that the relief sought is not of that nature. I must look at the whole case. The bankrupt's case, as put by the bill, is, that the deeds were executed, and that thereby he became entitled to the term, and if that is so, it passed to his assignees. In a sense it is true, that if the deeds are set aside the bankrupt may be said to be a trustee; but if that were a sufficient ground for holding the property to have remained in him notwithstanding the bankruptcy, it would follow that in every case where a bill was filed against assignees to set aside any transaction with the bankrupt, it would be necessary to make the bankrupt a party, because in every such case the bankrupt would become a trustee. It was also attempted to shut out

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a demurrer by the averment that *Hunter* alleges that there will be a large surplus coming to him under the bankruptcy; and that he insists, and the assignees admit, that for this and other reasons the term is not vested in the assignees. But the existence of a surplus is wholly immaterial; and as the assignees are stated to have entered into possession shortly after their appointment, their alleged admission of *Hunter's* interest must be referred to his supposed interest in respect of the surplus and nothing else. The averment merely is, that the assignees erroneously admit a matter of law against themselves. There is, therefore, no charge of an interest in *Hunter*; and that disposes of the class of cases like *Plummer v. May*, which lay it down that a plea is the proper course where an interest is charged. There is no general averment that *Hunter* claims an interest, but only that he makes a claim of a particular character, founded upon facts, which, on the face of the bill, can be seen to give him no interest at all.

The demurrer must therefore be allowed with costs.

1861.
 December 14th.

Investment—
 East India or
 Bank Stock—
 Costs.

A trust fund invested in Consols was paid into court under the Trustee Relief Act. On the petition of the tenant for life to change the investment into *East India* or Bank Stock, and for payment of the dividends to him, a transfer into Bank Stock was, under the circumstances, ordered; and, a petition being otherwise necessary, the costs were directed to be paid out of the corpus.

RE LANGFORD'S TRUSTS.

UNDER the will of *J. Langford*, a sum of £1,500 was directed to be invested in Government or real securities, and to be applied by the executors during the life of *H. Langford*, the petitioner, for his support, maintenance, and benefit, in such manner as the executors and administrators of the testator should in their discretion think proper, with limitations over for his children; and in default

of children the corpus to go to *F. Langford*. The fund was invested in Consols and transferred into court under the Trustee Relief Act. *H. Langford*, who was a bachelor, now petitioned for a transfer of one moiety into *East India* stock and of the other moiety into Bank stock for payment of the dividends to him for life, and that the costs of the petitioner and respondents might be paid out of the corpus.

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RE LANGFORD'S TRUSTS.
Statement.

The special circumstances relied on were ill health, and inability to add to his income on the part of the petitioner.

Mr. *E. F. Smith* for the petitioner.

Argument.

Mr. *R. Horton Smith*, for the respondents, did not oppose the application; but mentioned *Cockburn v. Peel* (a); and as to costs, *Equitable Reversionary Interest Society v. Fuller* (b).

Mr. *E. F. Smith*, in reply, said that, a petition being necessary, the costs were not increased by the application to transfer the fund.

The VICE-CHANCELLOR said, that he thought the circumstances were sufficient to warrant an order being made; but as an investment in *India* stock involved a possible loss of capital, the whole fund should be transferred into Bank stock. As no additional expense was caused by this part of the application, the costs might be paid out of the corpus.

Judgment.

(a) 9 W. R. 725.

(b) 1 J. & H. 379.

1862,

June 10th, and
26th.*Specific Per-
formance—Mis-
representation
—Inspection.*

Bill for specific performance of an agreement to take a lease of a limestone quarry. In the course of the treaty the Plaintiff had represented that the limestone was of a certain quality—the fact being that a quarry in the immediate neighbourhood had been worked, and the stone ascertained not to be of the specified quality. The result of this trial was not known to either party, but might have been ascertained on inquiry; and it further appeared that the Plaintiff had no knowledge of the quality of the limestone. The Defendant afterwards, and before signing the agreement, made a cursory inspection of the old quarry, and satisfied himself that the stone was limestone, but ascertained nothing as

to its quality:—*Held*, that the misrepresentation was a bar to a decree for specific performance; and the bill dismissed without costs.

Whether the agreement was or was not void—*Quare*.

4 *Diff* 153 22 Cl 5. 198

HIGGINS v. SAMELS.

THIS was a bill for specific performance of an agreement to take a lease of a field for the purpose of quarrying limestone.

The Plaintiff was the owner of a field under which was a bed of limestone, which had never been opened from the Plaintiff's field, though a quarry had been opened in an adjoining field, and lime procured which was not of first-rate quality, and had been tried and rejected by a railway company when a station in the neighbourhood was being built.

The Plaintiff, being ignorant of this fact, and having no experience in judging of limestone, on being told by the Defendant that the lime would be useless to him unless fit for the *London* market, represented to him that the limestone would produce lime of first-rate quality, fit for the *London* market. According to the evidence, the phrase 'fit for the *London* market,' would be understood in the trade as signifying lime of the best quality. It appeared also that the rejection by the railway company of the lime from the neighbouring quarry was a fact which might easily have been ascertained on inquiry as to how that lime had turned out. The Defendant after this conversation made a cursory inspection of the quarry in company with the Plaintiff and two friends of his own; but it did not appear that any of these persons were competent to judge, by inspection, of the quality of the stone for the purpose of lime-burning, the Plaintiff being a corn-dealer, and the Defendant a lime-dealer but not a lime burner.

Shortly afterwards, the Defendant signed an agreement dated the 11th of June, 1860, for a lease, at a rent of £50 per annum, to be proportionally increased if more than one-tenth of the surface of the field was opened. The Defendant subsequently ascertained that the limestone would not suit his purpose, and declined to accept a lease, on the ground that the stone was not such as had been represented to him. The Plaintiff thereupon filed this bill for specific performance.

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Statement.

Evidence was gone into at some length as to the particulars of the conversations and the inspection of the adjacent quarry, the result of which is stated in the judgment of the Court.

Mr. *Rolt* Q.C., and Mr. *De Gex*, for the Plaintiff:—

Argument.

The alleged representations amount to no more than speculative opinions, coming, as they did, from a man who had no special knowledge of the subject matter, and addressed to the Defendant who was engaged in the trade.

Further, if this were a good ground for resisting performance, the Defendant cannot insist on it after having himself inspected the stone. He relied not on what the Plaintiff said, but on what he and his friends saw. [They referred to *Attwood v. Small* (a).]

Mr. *Giffard*, Q. C., and Mr. *Bedwell*, for the Defendant.—The evidence shows that the Defendant did rely on the representations and not on the cursory inspection, which afforded no means of judging of the quality of the stone. As to the representation made by the Plaintiff, it is not pretended that he had any reason to suppose it to be true, even if he did not actually know it to be false.

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HIGGINS

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SAMELS.

June 6th.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This is a contest which comes very close upon the boundary that divides cases where the Court grants specific performance, from those in which it holds its hand on the ground of misrepresentation.

There is some conflict of evidence as to the precise words used in the representations relied on, but to a great extent the facts are common to both sides, and may be summed up as follows :—

The Plaintiff had become the owner of a small piece of land under which lay a bed of limestone, that had never been opened from the Plaintiff's field. In a neighbouring field a quarry had been dug, from which limestone had formerly been taken, and used in the manufacture of lime. It is now admitted, that the lime so obtained was not fit to be used in any building of a superior kind, though it was suitable for building purposes of an ordinary description. This, at least, is the almost undisputed result of the evidence. The lime had in fact been rejected for the construction of a railway station in the neighbourhood, and the company had gone to considerable extra expense in procuring lime for that purpose from a distance. In September, 1859, the Plaintiff had a conversation with a person of the name of *Coat*, who was a friend of the Defendant's; and according to *Coat's* statement the Plaintiff represented the limestone under his field to be "fit for the *London* market." This expression is not absolutely denied by the Plaintiff, though he gives a slightly different colour to the conversation. A more important conversation took place in May, 1860, between the Plaintiff, the Defendant, and *Coat*. I should state that the Defendant is a lime dealer but not a lime burner, and therefore not specially qualified to judge of limestone in its unburnt state. *Coat* is a stone-

mason, the Plaintiff is a corn-dealer, and it is not pretended that he had any experience as a judge of limestone.

Before the interview in May, according to the Defendant's account, *Coat* had repeated to the Defendant what he had previously heard from the Plaintiff, that the limestone would produce lime "fit for the *London* market." At the interview, the Plaintiff asked the Defendant whether he had thought over what *Coat* had said to him about taking the limestone field, and added that the limestone was of first-rate quality. The Defendant replied, that unless the lime would be fit for the *London* market he would not take the field; and the Plaintiff then assured him that the stone was of first-rate quality, superior to that commonly burned for the *London* market.

The Plaintiff gives a slightly different version of what passed. He says that he was never qualified to judge of limestone, that he had no knowledge of the quality of the limestone under his field, and was not aware that the expression "fit for the *London* market," was restricted in the trade to lime of the best quality, as appears to be the case from the evidence adduced by the Defendant. He says, that he did not represent the stone to be superior to that commonly burnt for the *London* market, but merely stated his own intention to quarry the stone and manufacture lime on his own account; whereupon the Defendant said that it would be better for him, as a lime merchant, to take the field, than for the Plaintiff, who knew nothing of the business, to work it himself.

It is to be observed, that he gives no denial to the Defendant's assertion, that he said that unless the lime would be fit for the *London* market he could not take the field; nor does the Plaintiff deny that he represented the limestone to be of first-rate quality. Upon the whole evidence, therefore, I must assume that these expressions were used;

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and if the matter rested there I do not know that there would be much difficulty in the case. Very considerable difficulty is occasioned, however, by what was afterwards done by the Defendant himself.

The Plaintiff's account is, that the Defendant said he should like to see a sample of the stone, to which he replied that he had better come to the place and look at it. Accordingly, a day or two afterwards, the Defendant accompanied by *Coat* and a Mr. *Dean*, who is called a surveyor, went with the Plaintiff into the open quarry in the neighbouring field. *Dean* applied some acid, and pronounced the stone to be limestone, but said he could not tell anything about its quality. This last observation, I may add, is proved on the part of the Defendant, but denied by the Plaintiff. They remained only a short time in the field, and returned to *Yeovil*. The Defendant says, it was only a quarter of an hour, and that he was too much hurried to make any examination of the quality of the limestone, as he might have done if he had had more time ; and he also states that his principal object in going there was to ascertain the distance of the field from the station, and not to examine the limestone, there being no quarry in the Plaintiff's field. I think, however, I must take it that part of the object of the visit was to inspect the stone in the neighbouring quarry.

Upon this evidence I must hold, that in the first instance a representation was made which went beyond the sort of puffing or speculative commendation which is held excusable in a vendor. Either party might have inquired what had been done with the lime procured from the quarry in the adjacent field, and whether it had proved to be fit for the *London* market ; and it is clear from the evidence now given, that, if any such inquiry had been made, there could have been no difficulty in discovering what the facts really were. These circumstances, I think, distinguish the case from the class

of which *Scott v. Hanson* (a) is a commonly quoted example, where it was held that the description of a field as an uncommonly rich water-meadow, when it was, in fact imperfectly watered, was too vague a representation to justify the inference that the purchaser relied upon it. The representation here is different, for it assigns a definite quality to the lime by describing it as fit for the *London* market. Neither can it be regarded as a merely speculative representation.

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The strongest authority in favour of the Plaintiff upon this point is *Jennings v. Broughton* (b), which was a bill seeking relief against a purchase of shares in a mine on the ground of misrepresentations of the character of the mine. L. J. *Turner* in his judgment, after referring to a representation that in a particular level the lode showed a body of solid ore resting on the vein, three feet wide, largely intermixed with lumps of ore and calamine, and continuing to maintain the same width and characteristics to the extent of the workings, being seventeen yards further, says, "I find no evidence to warrant this statement But to say that these statements in the report were not well founded, is one thing; to say that the Plaintiff was deceived by those statements, or was induced by them to purchase these shares, is another thing. Looking at the character which the Plaintiff gives of himself, and which is given of him by his witnesses, I think it impossible to believe that he could have been at all induced to purchase these shares by the statement of there being lumps of calamine in this level. And with respect to the lode continuing to maintain the same width and characteristics, the Plaintiff was twice at the mine, once before he purchased any shares, and the second time in the interval between his two purchases; and however ignorant he may be of mining, he must at least have been capable

(a) 1 Sim. 13.

(b) 5 D. M. G. 126.

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 ———
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of seeing whether the vein had or had not been laid open behind the point where the solid ore was presented to his view. If it had, he must have known what were its characteristics. If (as was the fact) it had not, he must have known that this statement could only be matter of speculation, and not of certainty."

That is, undoubtedly, very strong. There was a distinct representation of an alleged fact; but that was followed by an examination of the mine, which, according to the view taken of the evidence by the Court, must have shown that the representation was really matter of speculation.

Applying the same principle of law to the peculiar facts of the present case, I hold, first, that there was a definite representation; and, secondly, that the examination (conducted as it was by a lime dealer or stone mason and a gentleman who seems to have been something of a chemist and something of an architect,) was not such as to show that the previous representation must have been merely speculative. If it ought to be looked upon as a mere speculative statement about the quality of the lime, my judgment should be for the Plaintiff; but I cannot come to this conclusion. The quarry had actually been worked, and the lime had been tried in the neighbourhood. The quality was not matter of speculation, but matter of fact, which could easily have been ascertained. The information was at hand, which would have satisfied both parties to the treaty that the lime was not of the quality which the Defendant required.

With respect to the general rule of law, it is not contended that *Small v. Atwood* carries the doctrine as to representation so far as to cover this case. But there are other authorities which clearly show that it is not necessary to prove that the representation complained of was made with a knowledge that it was false: *Taylor v. Ashton* (a) is ex-

press upon the point. There it was attempted to get rid of a contract in consequence of misrepresentation as to the prospects of a company; and Lord *Wensleydale* in his judgment says, "It was said, that, in order to constitute that fraud it was not necessary to shew that the Defendants knew the fact they stated to be untrue; that it was enough that the fact was untrue if they communicated that fact for a deceitful purpose; and to that proposition the Court is prepared to assent. It is not necessary to show that the Defendants knew the fact to be untrue, if they stated a fact which was untrue for a fraudulent purpose, they at the same time not believing that fact to be true: in that case it would be both a legal and moral fraud."

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SAMUEL,
Judgment.

Evans v. Edmonds (a) carries the doctrine somewhat further. The representation was as to the character of a lady, the wife of the Defendant, on whom the Defendant was induced to settle an annuity by a separation deed; and Mr. Justice *Maule* says, "I do not say that it would be necessary to constitute such a fraud as would avoid the deed, to make the plea good on special demurrer, that it should in terms allege that the Plaintiff knew, at the time he made the representations, that the Defendant's wife was unchaste; because I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made."

The distinction between this kind of fraud and the express warranty of the fact stated is certainly very fine.

(a) 13 C. B. 777.

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 —
Judgment.

In applying the law to the facts of this case, I give entire credit to the Plaintiff's assertion that he knew nothing about the quality of lime ; and he has not been asked whether he was aware that the lime obtained from the quarry in the next field had proved a failure. I assume, therefore, that he knew nothing of the matter. But he admits that he knew the lime would be useless to the Defendant unless it was fit for the *London* market, and, therefore, (knowing nothing whatever about it), he took on himself to say that it was fit. Up to this point, therefore, the matter is clear, and all that remains is to ascertain whether the Defendant acted in reliance on this statement. That he relied solely upon it cannot, I think, be said ; but he undoubtedly did rely, to a great extent, upon it. What weighs upon my mind is the circumstance that the quality of the lime was not a mere subject of speculation, but a fact which the Plaintiff (without any special familiarity with the business) could have made himself acquainted with. He knew the quarry in the adjoining field had been worked ; and if he meant to deal with entire fairness, he ought—before making the representation that the lime was of the desired quality—to have made the obvious inquiry, what became of the lime that had been obtained from it ? Instead of doing so he makes a representation in order to secure a contract, without taking the trouble to inform himself what the truth was.

It is true, that the Defendant did not rely exclusively upon this statement, because he did go to look at the stone ; still his trade was not that of a lime burner ; and he cannot be supposed to have trusted merely to what he saw, he really knowing nothing of the quality of limestone.

Under all the circumstances, the case does not appear to me to be one in which this Court ought to interfere by decreeing specific performance ; but it is not necessary to

decide the nice question, whether the contract is valid or not.

There was a distinct representation of fact which the Plaintiff, though he did not believe it to be false, made without seeking the further information which was within his reach, and which would have shown him that the statement was not true. After this, notwithstanding the inspection made by the Defendant, it would not be right for this Court to enforce performance.

The bill will be dismissed, but without costs.

1862.
HIGGINS
v.
SAMELS.
Judgment.

6 Ch 236

ROSS v. BORER.

THIS was a special case.

The testatrix made a codicil to her will, dated the 12th of April, 1861, containing the following bequest: "I hereby direct my executor to purchase an annuity in Government securities to the amount of £50 a-year for my servant *Maria Shand*, in consideration of her faithful services, the annuity to commence from the day of my decease."

The testatrix died in 1861.

Maria Shand married a *Mr. Ross*, and the question raised by them on this case was, whether the annuity was perpetual or for life only.

Will—
Annuity—
Perpetual or
Life?

Direction to executor to purchase an annuity in Government securities, to the amount of £50 a-year, for *A.—Held*, that the annuity was perpetual.

Mr. C. C. Barber, for the Plaintiffs.—*Kerr v. Middlesex Hospital* (a) is precisely in point. The direction there was,

(a) 2 D. M. G. 576.

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 ROSS
 v.
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 —
Argument.

to purchase annuities in the *British* funds, and it was held that this was a segregation of a part of the corpus of the testator's property to answer the annuities; and that there being no restriction as to time the annuity must be deemed perpetual.

Other authorities to the same effect are *Stokes v. Heron* (a), *Lett v. Randall* (b).

Mr. Giffard, Q. C., and Mr. G. Lushington, for the residuary legatees:—

The general presumption of law is, that an annuity is given for life, and it is only special circumstances that can support the construction that it is to be perpetual.

In *Stokes v. Heron* the special circumstance was a gift over of the annuity, which therefore was clearly intended to last beyond the life of the original annuitant, and having passed that limit there was no limit short of a perpetual annuity which could be consistently implied.

Kerr v. Middlesex Hospital and *Lett v. Randall* are said to establish the principle, that, where there is a segregation directed of part of the estate, there the annuity must be taken to be perpetual. But that is stating the principle too broadly, because in every case there must be some segregation of property to answer the annuity. The real question is at what stage the segregation is directed: *Hill v. Potts* (c). If a fund is to be set apart to produce an annuity without any immediate reference to the person who is to enjoy it, and then at a subsequent part of the will this annuity is given away, there the inference is, that what was to be created was a perpetual annuity. But where the name of the annuitant is coupled with the direction to set apart the fund, the inference is, that the annuity is only for the life of that person.

(a) 12 Cl. & F. 161.

(b) 6 Jur., N. S., 1359.

(c) 10 W. R. 439.

Lord *Cranworth* in *Kerr v. Middlesex Hospital* said, that "*British funds*" did not necessarily mean Consols, but any investment which rested on the security of the *British* Government. So here Government security would include the purchase of a Government annuity, which was probably what the testatrix had in her mind.

1862.
Ross
v.
BORER.
—
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I can find nothing in the terms of this will to justify a departure from *Kerr v. Middlesex Hospital*; and though there are some expressions, especially in the judgment of Lord *St. Leonards*, on which it might be practicable to found an argument, I do not think they were used in a sense which is not perfectly consistent with the rest of the judgment. It is obvious, that, on every question whether a particular annuity is for life or perpetual, the first thing to be determined is the effect of the expressions contained in the will. Now, it can make no difference whether the fund out of which the annuity is to come, is to be purchased or to be taken out of the existing property of the testator. A direction to purchase an annuity does not necessarily import a perpetual annuity. But when an annuity is given without expressing that it is for life, then it is an open question whether it is for life or perpetual. Now, I consider that a direction to buy an annuity in the public funds, means to purchase such an amount in the public funds as will suffice to produce the annuity; and then the Court has held, that where a fund is to be purchased for *A.*, that fund belongs to *A.*; and it is on this ground, and not on any notion, that, as a matter of construction, annuity is to mean perpetual annuity, that the cases have been decided. That, I think, is the meaning of Lord *St. Leonards*, when he says (a) "What impro-

Judgment.
—

(a) 2 D. M. G. 587.

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Judgment.

bability is there, that, in the ordinary case, where an annuity is directed to be purchased with the proceeds of a testator's property, the annuitant is to take the annuity as purchased?"

The substance of that decision is, that where a particular fund is to be purchased to produce an annuity, the annuitant is entitled (in the absense of any contrary direction), to the particular fund so purchased and set apart.

The only distinction between the language of this will and that in *Kerr v. Middlesex Hospital*, is the use of the words "*in Government securities*," instead of "on;" but if in the one case the purchase of a Government annuity is supposed not to be pointed at, I do not see how it can be held to be meant in the other.

The sole question is, what is the thing which the testator directed his executor to buy; and consistently with the authority of *Kerr v. Middlesex Hospital* I cannot say that a Government annuity was meant.

The answer will be, that the annuity is perpetual, to be provided for by an investment in Government securities sufficient to produce £50 per annum.

1861.

Dec. 11th.

Divorce—Settlement—Re-Marriage—Divorce Act, 20 & 21 Vict. c. 85.

BOND v. TAYLOR. *L. R. 10 Ch. 509*

THIS was a bill by *Charlotte Bond* formerly *Charlotte Marshall*, the divorced wife of *H. S. Bond*, against the trustees of the settlement made upon her marriage.

By that instrument, dated 27th of July, 1840, a sum of 30,000 Sicca rupees, invested in promissory notes of the *Bengal Government*, was transferred to trustees, upon trust for the wife for life, for her separate use, and after her decease, "for all and every the child and children of the said *Charlotte Marshall* by the said *H. S. Bond* to be begotten," as the wife should appoint; and in default of appointment, for all and every the children of the said *Charlotte Marshall* by the said *H. S. Bond* to be begotten, in equal shares, payable as to sons at twenty-one, as to daughters at twenty-one or marriage. And the settlement proceeded "in case there shall be no child of the said *Charlotte Marshall* by the said *H. S. Bond*, or there being such, and every son shall depart this life under the age of twenty-one years, and every daughter shall depart this life under that age and unmarried," then the trust fund was to be subject to the absolute appointment of the wife, and in default to the husband for life, remainder to the wife's next of kin, as if she had died unmarried and intestate.

By the settlement made in 1840, on the marriage of *C. M.* (the wife) and *H. B.* (the husband) a fund was settled upon the children of the said *C. M.* by the said *H. B.*, and in default as *C. M.* should appoint.

In 1860 the marriage was dissolved, there being then no issue to take:—*Held*, that the power of appointment arose, notwithstanding the possibility of a marriage and future issue.

Whether a re-marriage after a decree of dissolution of marriage is lawful.—*Quære.*

The only issue of the marriage was a daughter, who died an infant, without having been married.

By a decree of the Divorce Court, dated the 2nd of July, 1860, the marriage was dissolved at the suit of the wife.

On the 6th of September, 1860, *Mrs. Bond* appointed the trust fund to herself absolutely.

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 BOND
 v.
 TAYLOR.
 Statement.

The trustees refused to assign the fund to her, on the ground that she might remarry her former husband, and that children might come into existence who would be interested under the settlement.

The bill prayed a declaration that the Plaintiff was absolutely entitled to the fund, and that if necessary the settlement might be rectified.

Argument.

Mr. *Giffard*, Q.C., and Mr. *Rogers*, for the Plaintiff.

Mr. *Rolt*, Q.C., and Mr. *Bagshawe*, for the Defendants :—

By the Divorce Act, 20 & 21 Vict. c. 85, s. 57, it is enacted, that it shall be lawful to the parties to a divorce suit to marry again after a decree of dissolution as if the marriage had been dissolved by death. It has been questioned, whether, under these circumstances, a re-marriage would be lawful, but there is at least enough in favour of that view to justify the trustees in refusing to give up the fund without the direction of the Court.

Judgment.

The VICE-CHANCELLOR said, that, without deciding any thing as to the validity of a re-marriage, it would be contrary to the scope of the settlement to suppose that the provision was meant for the possible children of a marriage which could not have been contemplated. The object was to provide for the issue of the marriage then contracted, and, that issue having failed, the power of appointment became operative, and the Plaintiff was entitled to the fund.

CASES IN CHANCERY.

475

SC on Appeal 1891 & 86. affirmed

1862.

1st & 2nd 769. 8th. 784

L R 19 513

THOMAS v. JONES.

July 15th, 16th.

L R 2 P L D 280.

BY the will of *Sarah Davies*, dated the 12th of August, 1825, certain freehold and copyhold estates, were devised subject to certain life estates, and among others to a life interest in *David Thomas Bowen Davies* in part of the said estates, and to other limitations, all of which had failed or determined before the institution of the suit, "to the use of such person or persons, and for such estate and estates, intents and purposes, manner and form, as the survivor of them, the said *David Thomas Bowen Davies*, *John Bowen Davies*, and *Margaretta Davies*, should by any deed or deeds or other instrument in writing, or in and by his or her last will and testament in writing, or any codicil thereto, grant, bargain, sell, release, direct, limit, or appoint, or give and devise the same or any part thereof; and in default of such grant, limitation or appointment, gift or devise," then over on certain limitations, under which *David Thomas Bowen Davies* became entitled, subject to the power.

Will—Power—
Married
Woman—Resi-
duary Devise—
Wills Act
(1 Vict. c. 26).

A general power given to the survivor of two persons may, under the Wills Act, be exercised by a general devise in a will executed by the ultimate survivor during the joint lives.

The 7th and 8th sections of the Wills Act preserve the previously existing incapacities arising from infancy and coverture respectively, but the 8th section does not preserve, in the case of married women, any incapacities not specially dependent on coverture, which are removed generally by other sections of the Act—as, for example, those relating to after-acquired property or power. Therefore, where a general power was

The testatrix died on the 5th of February, 1827; *John Bowen Davies* died on the 11th of May, 1832.

In April, 1838, *Margaretta Davies* intermarried with *David Fryer Nicholl*, and by their marriage settlement, dated the 17th of April, 1838, after limitations of property not in question in this suit as the said *Margaretta Davies* should appoint, with limitations over, the said *D. F. Nicholl* covenanted that it should be lawful for her the said *Margaretta*

vested in the survivor of *A.*, *B.*, and *C.* (a married woman with testamentary capacity), and *C.* ultimately became the survivor—*Held*, that the power was well exercised by a residuary devise in the will of *C.*, made while under coverture and during the life of *B.*

The circumstance that the devise contained limitations for the life of *B.*—*held* not to be a conclusive indication of an intention not to exercise a power which would only come into existence in the event of *B.* predeceasing the testatrix.

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 —
Statement.

Davies, "during the continuance of her then intended coverture, to exercise from time to time all powers of appointment of what nature or kind soever, which might accrue to her during such coverture, at her will and pleasure, without any control or hindrance of, from, or by the said *D. F. Nicholl*, the said *D. F. Nicholl* thereby covenanting to concur in and duly execute with her all such powers of appointment as should require such his concurrence or joint execution."

On the 18th of August, 1838, *Margaretta Nicholl* made her will, and thereby, after giving certain legacies and devising certain estates not in question in the suit, and among others an estate in *Llangollen*, which was subject to the appointment of the survivor of the testatrix and her brother *John*, made the following residuary devise and bequest:—"And as to all the rest, residue, and remainder of my real and personal estate whatsoever and wheresoever, and of what nature or kind soever, that I may die possessed of and not given and devised by this my will, except such real and personal estate as may remain subject to the trusts of my marriage settlement, by reason of no specific disposition of any part thereof having been made by me under the power for that purpose in the said settlement contained, (and of which this general devise and bequest is not to be taken as in execution), I give, devise, and bequeath the said residuary real and personal estate." Then followed limitations thereof among her children, and in default to the said *David Thomas Bowen Davies* (under the description of *Bowen Davies*) for life, with remainder to his children, and in default of such issue to *Henry Jones* and the Defendant *Eliza Jones* equally, as tenants in common in fee.

By a codicil to the said will, dated the same 18th of August, 1838, it was declared that the devise and bequest to *Henry Jones* and *Eliza Jones* should take effect only

on their attaining twenty-one, and that, on the death of either under that age, the whole residue should go to the survivor.

David Thomas Bowen Davies died, without having had issue, on the 24th of May, 1848.

Margaretta Nicholl died on the 17th of October, 1858, without having had issue, and leaving her husband surviving.

Henry Jones died under the age of twenty-one; and *Eliza Jones* and her husband (*John Jones*) in her right claimed the said estates under the residuary devise in Mrs. *Nicholl's* will.

The bill was filed by a creditor of *David Thomas Bowen Davies*, whose estate was insufficient, and prayed that the said real estates might be applied in payment of the debts of the said *D. T. Bowen Davies*.

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THOMAS
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Statement.

Sir *Hugh Cairns*, Q.C., Mr. *Hobhouse*, and Mr. *H. Williams*, for the Plaintiff:—

Argument.

At the time when the will of Mrs. *Nicholl* was executed, two of the three persons, to the survivor of whom the power under which the Defendants claim was given, were alive—viz. Mrs. *Nicholl* herself, and *David Thomas Bowen Davies*. At that time, therefore, the power was not in existence; and Mrs. *Nicholl* having been a married woman, the subsequent death of *D. T. B. Davies* in her lifetime could not make the will a good exercise of a power which was not in existence at the date of the will.

Before the Wills Act, it was settled that a testamentary power to the survivor of two persons could not be executed during the joint lives by the ultimate survivor: *M'Adam v*

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Argument.

Logan (a), Hole v. Escott (b), Doe v. Tomkinson (c), Countess of Sutherland v. Northmore (d), 1 Sugden on Powers (e).

Then there is nothing in the Wills Act to alter this state of the law. It is not necessary to consider the case of a testator or an unmarried testatrix, because, even assuming that a residuary devise was meant to operate on after-acquired powers as well as on after-acquired property by force of the 24th and 27th sections, still this conclusion cannot apply to the case of a married woman, which is expressly excluded by the 8th section. That provides expressly that the testamentary capacity of a married woman shall not be increased by the Act, and, if read literally, is conclusive as to this case. The construction applied to this clause in *Bernard v. Minshull (f)*, is quite consistent with our view; for in that case the married woman had a power exercisable at the date of her will.

The real test is this:—Could a testamentary power given to a survivor have been exercised before the Wills Act, either by a man or a woman during the joint lives? If not, neither can it be exercised by a married woman now; because that would be an enlargement of the testamentary capacity of a married woman, which the Act expressly excludes. Now, there was no mode by which such a power could have been exercised by anticipation under the old law; and though a man may, perhaps, do it now, that is merely by force of the enlarged capacity, which is not given to married women: *Price v. Parker (g), Doe v. Bartle (h).*

Then, even if there was a capacity to exercise the power, a contrary intention is apparent on the will, the

(a) 3 B. C. C. 310.

(b) 2 Keen, 444; 4 My. & Cr. 187.

(c) 2 M. & S. 165.

(d) 1 Dick. 56.

(e) 7th Ed., pp. 333, 338.

(f) Johns. 276.

(g) 16 Sim. 198.

(h) 5 B. & Ald. 492.

residue being given in certain events to *Bowen Davies*, who could not be alive to take if the residuary gift were intended to comprise the property subject to this power.

Mr. *Giffard*, Q.C., and Mr. *W. Pearson*, for the Defendants, Mr. and Mrs. *Jones*, were not called upon.

Mr. *Rolt*, Q.C., and Mr. *F. Waller*, Mr. *Freeling* and Mr. *Beck*, appeared for other parties.

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Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This is a case of great importance ; but I cannot say I have had any doubt what the effect of the Wills Act is. The course of decisions prior to the Wills Act is governed by what perhaps I may call the leading case of *Doe v. Tomkinson*. Lord *St. Leonards* states the old law very pithily and simply, in his book on *Powers* (a), to this effect : that, although a contingent power, that is, a power which only arises upon a given contingency, may be exercised before that contingency happens, as has been frequently decided ; yet if the donee of the power is himself contingent, he cannot exercise it until he is ascertained, because, having no power, he cannot be taken to have exercised it. It is an excessively refined distinction. When the power itself is given upon a contingency, the donee has no power until the contingency has happened, although he is the person in whom the power is to be vested upon the contingency happening. In the other case the donee himself is not ascertained. When a power is given to the survivor of two, it might, in the creation of the power, be supposed to have been contemplated that each should be at liberty to exercise it, taking his chance of the survivorship ; but this I presume would have been held, under the old law, not to be a due execution, because the power would not have vested in either until the survivor was ascertained. No case, however, has precisely

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(a) 1 Sugd. Pow. 7th ed., p. 338.

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determined the point; but assuming that to be the effect of the old authorities, I have now to consider the operation of the Wills Act.

In the first place, I will refer to sections 24 and 27, deferring for the present the consideration of section 8, which relates to married women. I should first observe, that, prior to the Wills Act, there had been a series of decisions of a somewhat narrow description, in which it was considered that a devise of land must operate, by way of conveyance, only upon land which the testator had at the date of his will, the ground of these decisions being, that a testator could devise nothing that he had not. The question thus raised was very similar to that which I am now considering, viz. whether a person can exercise a power over lands before that power is absolutely vested in him, and was disposed of in this way by the Wills Act: The 24th section enacts that every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator—unless a contrary intention shall appear by the will; and by the 27th section (for the two are connected together) it is enacted that a general devise of real estate shall be construed to include any real estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will. The 24th section draws down the will to the date of the death of the testator, thus getting over the difficulty as to after-acquired property.

Then there arose another difficulty, which was dealt with by the 27th section. Dispositions describing property only by general words had been held not to operate by way of appointment, if there was anything else upon which they could operate; and therefore, unless the person who executed the power of appointment referred either to the power or to the subject-matter of it,

in such a manner as to make his intention to exercise the power plain, or else had nothing upon which the words he used could possibly operate otherwise than by way of execution of the power—unless one of these two circumstances occurred, property under a testator's absolute dominion would fail to pass for want of an expression on his part of an intention to exercise the power. The Legislature, therefore, thinking that the intention of the testator would frequently be disappointed by this rule, enacted, that wherever a person had a general power, a general devise of all his real estate should operate upon that which was only subject to his power.

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When you have these two sections placed together, the question naturally arises, what was intended to happen in the case of a person having a general power acquired after the date of his will, a case which bears a very strong analogy to, and goes very far towards, the decision of this case. Now, that was actually decided in *Stillman v. Weedon* (a): there it might have been argued, that the testator had not at the date of his will any power at all that he could exercise; and that, although the Legislature says on the one hand that the will shall speak from the death, and on the other hand, that a general gift shall operate upon all property over which the testator has power, yet you cannot properly apply that to a case where the power itself has no existence at the time when the will is executed. It might have been urged, that a testator cannot be supposed to contemplate the exercise of a power which he does not possess, and that, to extend the 27th section to a case of that kind, would be going beyond the general purport and intent of the Act. That was the line of argument taken; but the contention did not prevail, it being considered, and, in my opinion, justly considered, that the principle to govern such a case is this: you must assume that a testator making his will after the Wills Act

(a) 16 Sim. 26.

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 —
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supposes that, to all intents and purposes, the will he has made will be construed by the Act. Therefore, where he acquires property after making his will, he looks to the Wills Act, and finding clauses to meet the case, he sees that there is no necessity for republishing his will.

It seems to me to be the true construction of the statute, coupling the 24th and 27th sections together, that a will may operate as an execution of all powers vested in the testator immediately before his death. If that construction, which was come to in *Stillman v. Weedon*, be sound (and Lord *St. Leonards* does not dissent from it), a person *sui juris* must be held to intend his will to operate on powers which he had not at the date of executing it, but which he acquired before his death. So, if *Margaretta Davies* had not been a married woman, and if no contrary intention had appeared on the will, she must have been assumed to have intended these estates to pass by a general devise.

I have now to consider the effect of the 8th section. In *Bernard v. Minshull* the question was, whether a general gift by a married woman would operate to pass property over which she had only a testamentary power? And the argument there was, as here, that the intention of the 8th section was, that no will by a married woman should be valid, except such a will as she might have made before the passing of the Act. The explanation I then gave (to which I still adhere) was, that inasmuch as a previous section had enacted that all property might be disposed of by will, which seemed to be a general and complete enactment, it was necessary to introduce the two sections, the 7th and 8th, by one of which it is declared that no will made by an infant under twenty-one shall be valid, and by the other, that no will made by any married woman shall be valid, except such a will as might have been made before the passing of the Act. That answers Mr. *Williams'* argument. He suggests, that if you construe the 24th section as applying to the case of a married woman,

then, a married woman having made a simple will, and becoming discoverd before death, the 24th section would make the will valid. The answer is, that the 8th section was meant to meet that case. In the same way as to infants, it may be argued, that an infant may attain full age, and that a will made before that time would speak from his death, and become valid. And so it would but for the 7th section, which annuls all wills made by persons under incapacity from the moment of their being made; and the true construction, I apprehend, of the 7th and 8th sections is, that the statute does not give capacity to those who have no testamentary capacity; but when persons have capacity to will, as in the case of married women with a testamentary power, then you must deal with the will so made according to all the rules of construction which are laid down by the Act as to wills in general. That is the conclusion to which I come upon that part of the subject. This lady having capacity to make a testamentary appointment in the first instance, it is no answer to say she has no capacity to will because she is not yet a survivor; that would apply just as much to a feme sole or a man, and does not depend on the special incapacity of coverture which the 8th section was inserted to preserve. A man has no capacity to make a gift under a power before he has acquired it. Nevertheless, when a testator makes a general bequest and afterwards acquires a power, that power takes effect by virtue of the general bequest; and the rule applies equally to a married woman. The construction I give to the 8th section is, that it disables a married woman from doing anything which before the passing of the Act she could not have done by reason of her coverture; it preserves the incapacity of coverture as it stood before the Act, but, as regards any incapacity arising from matters independent of coverture, applicable to men and women alike, the statute was not intended to draw a distinction between married women and other persons. The statute makes a will operate as if

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executed immediately before the death, and the effect of this is, in the case of a married woman, that she must be regarded as a married woman executing the instrument immediately before her death, and passing thereby everything of which, at the time of her death, she had acquired a power of disposing.

The case of *Price v. Parker (a)*, decided by Vice-Chancellor *Shadwell*, has no bearing at all upon this case. There a married woman purported to execute a power whilst she was disovert, and that power being given to her merely for her protection in case she should not survive her husband, the Court held properly enough that the object of the instrument was at an end. It was a power to take effect in a given event, which never occurred. That is an entirely different case, having no bearing on the present.

A point that appeared to be open to some little doubt was made with reference to the circumstance of the testatrix giving *David Thomas Bowen Davies* a life interest in the residuary estate. It is said that in that she contemplates his being alive at her death, and if alive at her death the power would not arise; she must be taken, therefore, as not having intended to exercise a power which could only arise upon the death of one of the persons in whose favour she exercises it. The first observation that arises upon that is, that it is a general sweeping devise, and that the scheme of the Legislature is, that all general and sweeping devises shall take in everything for the purpose of preventing a person from dying intestate as to anything he has power to dispose of. Now, the position of the case is this:—If the testatrix had afterwards acquired property to her separate use, that would pass by a gift of this description. She wished to sweep everything into that devise. She might acquire other property, irrespective of the estates subject to the power, which *Bowen Davies*, her brother, might well

(a) 16 Sim. 198.

take. That sufficiently accounts for the limitations in his favour. If she did not survive him, then as far as the estates subject to the power were concerned, the will would be inoperative. If she did survive him, according to my previous reasoning, it would be operative. Still, in any case, he would take any other estate she might have. She meant to make a general disposition of everything, and it does not appear to me that the gift to *David Thomas Bowen Davies* is a clear indication on her part that she did not intend the general devise to have effect as an appointment.

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—
Judgment.

On the contrary, I think the intention stands very plain upon the will, because the testatrix makes an exception of a particular power, raising an inference that she intended to make no other exception. She disposes of certain other property in *Llangollen*, over which she had acquired a power as the survivor of her brother *John*, describing the estate, but without making any special reference to the power at all. She gives all the rest, residue, and remainder of her real and personal estate, with this exception—"except such real and personal estate as may remain subject to the trusts of my marriage settlement, by reason of no specific disposition of any part thereof having been made by me under the power for that purpose therein contained, and of which this general devise and bequest is not to be taken as in execution." I do not remember any will that has come before me in which there has been a more marked exception. She had before her mind the Statute of Wills, or those who advised her had. She knew what the effect would be, and she expressly excepts from the effect of the statute all the property over which she has a general disposing power by virtue of her marriage settlement; and then, having made that exception, she proceeds to make the disposition which I have to construe. She describes in her will the extent to which she wishes to go in excepting from the general devise certain property over which she has a general power, and thereby affords the strong-

1862.
 THOMAS
 v.
 JONES.
 Judgment.

est possible inference that she intended to pass everything else she could by means of this general devise. Under such circumstances, the fact that you find a devisee introduced, who, in the event of his surviving her, would frustrate the execution of the power, is not enough to authorise the conclusion that the testatrix did not intend to execute the power. I therefore hold that the residuary devise operates as an execution of the general power which became vested in the testatrix after the date of the will, and dismiss the bill with costs.

July 22nd.

Interpleader—
 Claim of Lien—
 Jurisdiction.

Where a plaintiff in an interpleader suit had previously set up a claim of lien, and had pleaded it in defence to an action at law—
Held, that this was no bar to an interpleader order being made on the terms of the Plaintiff withdrawing his plea and paying the costs at law and in equity up to the time of such withdrawal.

JACOBSON v. BLACKHURST.*

THIS was an interpleader suit; the only question of interest was, whether the Plaintiff was precluded by having set up a lien in defence to an action at law, which, on the face of the bill, he had not offered to withdraw otherwise than by submitting "to act as the Court should direct, in order that the Defendants might interplead."

The Plaintiff was a commission merchant at *Liverpool*. The two first Defendants, *R. Blackhurst* and *E. Dunning*, were earthenware manufacturers at *Tunstall* in *Staffordshire*. *Levison* and the other Defendants were the members of a firm carrying on business as *Vives, Levison, & Co.*, at *Birmingham*, and as *Vives & Co.*, at *Valparaiso*.

The Plaintiff was in the habit of forwarding goods abroad for the firm of *Vives, Levison & Co.* About May, 1860, *Levison*, on behalf of his firm, gave *Blackhurst & Dunning* an order for earthenware, to be sent to *Runcorn* to the order of the Plaintiff. This earthenware was accordingly sent to the Plaintiff in eighty-one crates, and it was paid for by a bill accepted by *Levison* for £182 18s. 9d. On the 28th of

* Ex relatione.

July, 1860, the Plaintiff received from *Levison* an advice note respecting the batch of earthenware, stating that the goods were "to await the further instructions of *Vives, Levison, & Co.*"

1862.
JACOBSON
v.
BLACKHURST.
Statement.

In August, 1860, a suit in Chancery was instituted, which had for its object the dissolution of the partnership of *Vives, Levison, & Co.*; and on the 31st of August, 1860, *John Percival*, of *Birmingham*, was appointed receiver in that suit. In September, 1860, the Plaintiff *Jacobson* had an interview with *Percival*, and in course of conversation mentioned the eighty-one crates of earthenware; whereupon *Percival* apprized the Plaintiff that he must not deliver this earthenware to any one without his, *Percival's*, order. On the 12th of October, 1860, *Blackhurst & Dunning* commenced an action against *Vives, Levison, & Co.*, on a bill for £142 2s., which had been given in payment for goods not the subject of this suit. On the 1st of December, 1860, an agreement was entered into for settling such action, on the terms, so far as they affect this case, that the action should be stayed, that the bill for £182 18s. 9d., given for the eighty-one crates of earthenware, should be retired by *Blackhurst & Dunning*; and that, on delivery of the goods for which such bill was given (being the eighty-one crates) the bill should be given up; the arrangement as to the delivery of the goods and bill to be carried out within a week, or the action to proceed. This arrangement was made by the solicitor for the receiver in the Chancery suit; but the receiver, in his evidence, denied having given him any authority to settle the said action. On the 3rd of December, 1860, *Blackhurst & Dunning* wrote to *Jacobson*, asking for a transfer of the goods on the terms of the agreement for settlement of the action. In answer *Jacobson*, on the 4th of December, 1860, wrote to say, that, as the affairs of *Vives, Levison, & Co.*, were in Chancery, and a receiver appointed, he was not in a position to comply.

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v.
BLACKHURST.
Statement.

Further correspondence ensued, in the course of which, *Jacobson*, on the 2nd of January, 1861, wrote thus to the Defendants, *Blackhurst & Dunning* :—" If you will hand me a guarantee holding me harmless of all claims Messrs. *V. L. & Co.* or their estate may make against me for delivering these eighty-one packages to you, and also pay me all my expenses for cartage, portorage, and warehouse rent, up to the time the delivery takes place, I have no objection to comply with your wish."

This offer was not accepted, and on the 26th January, 1861, *Blackhurst & Dunning* commenced an action against *Jacobson*, for the recovery of the eighty-one crates of earthenware. On the 11th of February, 1861, declaration was delivered. On the 5th of March, 1861, *Jacobson* pleaded to this action ; and on the same day he filed the bill in the present suit, making *Blackhurst & Dunning, A. Vives, F. Vives, James*, and the assignees of *Levison*, who had become bankrupt, and the other members of the firm of *Vives, Levison, & Co.*, Defendants ; and he prayed that the action might be restrained, and that the parties might interplead.

On the 6th of March, notice was given for trial at *Stafford* on the 11th, and *Jacobson* in his evidence stated that he only pleaded to the action in order to save judgment going by default. By his 4th plea in the action *Jacobson* alleged that the goods were the property of *Vives, Levison, & Co.* ; and that, while the goods belonged to the said firm, they delivered them to him, and that he received them as a commission and shipping agent, to be kept and taken care of, and to be shipped and consigned by him to the order of the said firm of *Vives, Levison, & Co.*, upon the terms, amongst others, that he, *Jacobson*, should have a lien on the said goods for the warehouse rent, carriage, portorage, and other expenses and disbursements he should incur in and about the premises, and should be entitled to detain the same as security for the repayment of the said warehouse rent, carriage, portorage, and other expenses and dis-

bursements ; and he further alleged by the same plea, that, before the goods became the property of *Blackhurst & Dunning*, he, *Jacobson*, had incurred expenses for warehouse rent, carriage, and portorage of the said goods, and he claimed a lien on the goods for the same.

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JACOBSON
v.
BLACKHURST.
Statement.

By his bill in this suit *Jacobson* made no claim for lien, nor did he state what he had pleaded to the action, nor did he withdraw any claim for lien ; but his bill contained a statement, " that he was ready to deal with the said goods as the Court should direct, in order that the several parties might interplead and settle their several claims thereto amongst themselves ;" and the first paragraph of the prayer ran thus :—" That the said Defendants may severally set forth to which of them the said goods belong, and how in particular they make out their claims thereto, and that they may interplead, and settle and adjust their claims and demands between themselves, the Plaintiff being desirous and agreeing that the said goods should be handed over to such of them to whom the same shall in the opinion of this Honorable Court appear of right to belong."

On the 9th of March, 1861, an injunction was granted, (*Blackhurst & Dunning* appearing and opposing), on the terms of the Plaintiff withdrawing the pleas in the action, the costs to be paid as the Court should thereafter direct.

The case now came on upon motion for decree.

The Defendants, members of the firm of *Vives, Levison, & Co.*, had been served abroad in *Valparaiso*, but did not appear, and the bill was taken pro confesso against them.

The assignees of *Levison* claimed no interest, and *Blackhurst & Dunning* thus became entitled to the goods from an absence of claimants.

1863.

JACOBSON

v.

BLACKHURST.

Argument.

Mr. *Rolt*, Q.C., and Mr. *Bednell* appeared for the Plaintiff.

Mr. *Daniel*, Q.C., and Mr. *Welford*, for *Blackhurst & Dunning*, insisted that the case was an improper one for interpleader, inasmuch as *Jacobson* had raised a plea of lien in the action, and that it was an established principle in equity that the Plaintiff in an interpleader suit could claim no interest in the goods to be interpleaded for: *Mitchell v. Hayne* (a). If the Plaintiff had set out his pleas on the bill, the bill would have been demurrable.

Mr. *Giffard*, Q.C., and Mr. *Begg*, for the assignees.

Mr. *Rolt*, in reply, quoted *Crawshay v. Thornton* (b), where lien was claimed on the face of the bill, but it was not necessarily demurrable, as the pleader had introduced a statement that the claim to lien was admitted.

Judgment.

The VICE-CHANCELLOR decided that the case was not an improper one for interpleader; and that, though the Plaintiff *Jacobson* was wrong in pleading a plea of lien to the action, concurrently with his bill for interpleader, yet that was met by the withdrawal of his pleas, and by making him in the first place pay the costs of *Blackhurst & Dunning* in the action at law, and their costs of the present suit up to and including the order for an injunction, getting these costs over again from the absent defaulting Defendants. The Plaintiff would have a lien on the goods for his costs of suit subsequent to the injunction, and *Blackhurst & Dunning* would have the goods on payment to the Plaintiff of such subsequent costs. The absent defaulting Defendants would pay the costs of the action at law, and all the costs of this suit, excepting those of the assignees, who would have no costs, their disclaimer not having been sufficiently explicit.

(a) 2 Sim. & S. 63.

(b) 2 My. & Cr. 1.

4 Cl D 885
6 — 442

8 Cl D 466
8 — 467

CASES IN CHANCERY.

491

16 Eq 171

389 715
11 14 of 1838 STANLEY v. STANLEY.

SC 16 C.A.S. 714

THIS was a bill filed to obtain a declaration as to the construction of the will of *Matilda Assheton Smith*, and also praying that issues might be directed whether certain words were part of the will.

Thomas Assheton Smith, the younger, was possessed of a mansion-house and an estate of great value, called *Vaenol*, near *Bangor*, in *Wales*, and also of a mansion-house at *Tedworth* in the county of *Hants*, and adjoining property situate partly in the same county and partly in the county of *Wilts*. A portion of the *Tedworth* property was purchased by himself and the remainder of the property and the whole of the *Welsh* property descended from his father.

By his will, dated the 22nd of July, 1857, he described himself as "of *Tedworth House* in the county of *Southampton*," and devised to his wife *Matilda Assheton Smith* all his "lands and hereditaments at or near *Tedworth*," charged with certain annuities of the aggregate amount of £680, including an annuity of £50 to his valet *Atwell*; and also devised and bequeathed to his said wife "all other his real and personal estate."

The testator died on the 15th of September, 1858.

ground to try whether particular restrictive words were or were not part of the will.

Where a will contained a devise of hereditaments "in the county of *Hants*," described as "my *Tedworth* estate," and it was proved that the testatrix had an estate at *Tedworth* extending into the two counties of *Hants* and *Wilts*, but which had been dealt with without regard to the county division, and the will contained various indications derived from the limitations of the estate and the value of the *Hants* and *Wilts* portions of it, tending to show that the testatrix must have intended to deal with the whole estate—*Held*, that although no one of these circumstances alone would have controlled the words of the devise, their cumulative force was sufficient to justify the rejection of the words "in the county of *Hants*" as *falsa demonstratio*.

Where a bill is not framed to establish a will and the heir does not dispute it—*Semble*, that the Court has no jurisdiction to declare against the heir as a Defendant the construction of a strictly legal devise as regards the quantum of the subject matter. But if the heir, elects to be dismissed, the Court will make such a declaration for the guidance of the trustees.

1862.

June 27th, 28th;
July 26th.

Will—Construction—
Mistake—Issue
devisavit vel
non—Evidence.

In construing a will of real estate the Court will look at the nature and circumstances of the property and at the value of the subjects of the various devises, and if the whole will, read by the light of such circumstances, discloses an intention inconsistent with restrictive words in the description of the subject of a devise, those restrictive words may, as a matter of construction, be rejected as *falsa demonstratio*.

Evidence of the intention of a testator or of mistake in the preparation of his will is not admissible, and an issue will not be directed on this

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 v.
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 —
Statement.

The said *Matilda Assheton Smith* made her will, dated the 9th of November, 1858, which, so far as material, was as follows:—

“This is the last will and testament of me, *Matilda Assheton Smith*, of *Vaenol* in the county of *Carnarvon*, and of *Tedworth* in the county of *Hants*, widow of *Thomas Assheton Smith*, Esquire, late of *Vaenol* and of *Tedworth* aforesaid, now deceased. I give and devise the mansion-house at *Vaenol*, near *Bangor*, and all the manors, messuages, farms, slate quarries, lands, tenements, and hereditaments in the principality of *Wales*, devised to me by the will of my said late husband, and all other hereditaments in the said principality (if any) of or to which I shall be seised or entitled, or as to or over which I shall have power of disposition by my will at my death. . . . To the use of *F. Drummond* and *Thomas Best* (the trustees for my *Tedworth* estate hereinafter devised), their executors, administrators, and assigns, for the term of 500 years computed from the day of my death, without impeachment of waste, for the purpose of raising from and out of my said *Welsh* estates, by or under the trusts hereinafter declared of the said term, the sum of £40,000, and for raising and securing interest thereon at the rate of £4 per cent. per annum in the meantime.” After which the uses of the *Welsh* estates, subject to the term, were declared, and the trusts of the term were declared as follows:—

“Upon trust that they the said trustees, or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, shall at such time after my death as shall be found convenient, by mortgage of all or any part of the said hereditaments or estates comprised in the said term of 500 years, for the whole or any part of the said term, raise the said sum of £40,000, which I intend to be an addition to my *Tedworth* estates hereinafter devised, and to be disposed of accordingly in manner hereinafter

directed." Then followed directions as to the mode of raising the said sum, and for raising and paying interest thereon in the meantime at the rate of £4 per cent. per annum, and, subject to the said trusts, to permit the persons entitled under the limitations thereinbefore contained to receive the rents and profits, and a proviso for cesser of the term, subject to any mortgage made thereof, so soon as the said sum of £40,000 and interest as aforesaid should have been raised; and after other clauses the will proceeded as follows:—

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"I give and devise my mansion-house at *Tedworth* in the county of *Hants*, and all my manors, farms, lands, tenements, and hereditaments *in the county of Hants* devised to me by the said will of my said late husband (subject to the annuities charged thereon by such will, and subject to an additional or further annuity of £50 per annum to be payable to *Atwell*, the valet of my late husband, during his life as hereinafter mentioned), and all other hereditaments in the said county of *Hants* of or to which I shall be seised or entitled, or as to or over which I shall have a disposing power by any will at the time of my death (all which hereditaments *in the county of Hants* are hereinafter described or referred to as my *Tedworth* estate) to the uses and subject to, with, and under the provisos, powers, and devises hereinafter contained."

The first of these uses was to the use of *Francis Sloane Stanley*, the Plaintiff (then and now an infant), for life, without impeachment of waste, with remainders in strict settlement to his first and other sons, and limitations over.

The will contained a direction, that if the tenant for life or in tail male, or in tail by purchase, for the time being entitled in possession to "my said *Tedworth* estate" should die under the age of twenty-one years, "the said *F. Drummond* and *Thomas Best*

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(the trustees for my said *Tedworth* estate) or the survivor of them, or the executors or administrators of such survivor, or their or his assigns," should enter into the possession and management of the same estate during the minority, and out of the proceeds pay to the guardians of the tenant for life or in tail so much as should be required for his maintenance, education, and advancement during minority; "and I direct that the allowance for the purposes aforesaid shall be on the most liberal scale, and shall be made whether the minor entitled as last aforesaid shall or shall not have a father living and capable of maintaining him or her." The residue of the income was directed to be accumulated, to be paid to such minor on attaining twenty-one, or to his executors in the event of the minor being a tenant in tail dying under that age and leaving issue inheritable, but otherwise to be disposed of as thereafter directed concerning the proceeds of the sale of "my said *Tedworth* estate or any of the hereditaments comprised therein under the power of sale hereinafter contained."

Then followed a clause empowering every male tenant for life of "my *Tedworth* estate" to appoint a jointure or jointures not exceeding in the whole £500 in favour of any and every woman he should marry; with a proviso that "if the same hereditaments would under this power be liable at any one time to the payment of a larger yearly sum in the whole than £1,000, then the posterior charge or charges shall not take effect or shall only partially take effect in possession until the amount of the previous charge shall cease or be diminished, so as always to limit the existing annual charge to the sum lastly specified."

There was also a power to every tenant for life to charge portions for younger children not exceeding £5,000 for one child, £10,000 for two, £15,000 for three, or £20,000 for four or more, with a similar proviso that not more than £40,000 of such charges should be subsisting and effective

at any one time. There were also powers of sale and exchange of "my said *Tedworth* estate," any proceeds to be applied first in discharging incumbrances and then in the purchase of freehold hereditaments in fee simple in *England* or *Wales*, or copyhold or customary premises or long leaseholds "convenient to be held with the hereditaments comprised in my said *Tedworth* estate," or to be acquired under the trusts of the will, the same to be settled on the uses declared of "the hereditaments comprised in my said *Tedworth* estate hereinafter devised."

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 Statement.

And as to the charge of £40,000 directed to be raised "out of my said *Welsh* estates," the trustees were to apply the same "in the purchase of freehold lands and hereditaments near to or adjoining my said *Tedworth* estate or elsewhere in the said county of *Hants*, or in some adjoining county or counties, of an indefeasible title of inheritance; which lands and hereditaments so to be purchased shall be an accretion to my said *Tedworth* estate, and shall be conveyed as aforesaid, and limited or settled to the same uses, and subject to, with, and under the same provisoes, powers, declarations, and directions as are hereinbefore expressed or contained concerning my said *Tedworth* estate, or the hereditaments comprised therein."

The furniture and effects at *Tedworth*, except the plate and the farming stock, were bequeathed upon trust to sell the farming stock and apply the proceeds on the trusts declared of the £40,000, and with respect to the furniture and effects, upon the ordinary heir-loom trusts.

And after various pecuniary legacies, there was the following gift: "I give to *Atwell*, the valet of my late husband, an annuity of £50, to be payable to him during the term of his natural life, and to be issuing out of and charged upon all my hereditaments at or near *Tedworth*;" such annuity to be payable quarterly, on the same days as the annuity payable to him under her husband's will.

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 v.
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 Statement.

And the residue of the personalty was given to testatrix's sister *Harriet Heneage*.

The testatrix died on the 18th of May, 1859. The bill was filed by the infant tenant for life, *Francis Sloane Stanley*, against the heir of the testatrix, the trustees, and various persons interested in remainder, and contained, among other allegations, the following :—

"In giving instructions for the devise of her *Tedworth* estate, or of the manors, farms, lands, tenements, and hereditaments which in the said will are described as devised to her by the will of her late husband, subject to the amounts charged thereon by such will, the said testatrix did not mention or allude to the county of *Hants*, and the reference to the said county in the devise was introduced by mistake and without her instructions; and in particular the words *in the county of Hants* as they appear in [certain specified parts of the will, being the portions hereinbefore printed in italics in the clause at page 493] form no part of the will of the said testatrix."

The bill prayed that a proper issue or proper issues devisavit vel non, might be directed as to the said devise, and in particular whether the words *in the county of Hants*, in the places before mentioned, did or did not form part of the will of the said testatrix; and that it might be declared, that, according to the true construction of the will, the whole of the freehold manors and hereditaments, as well in *Wilts* as in *Hants*, forming part of the *Tedworth* estate, were well devised, and were subject to the limitations contained in the will in respect of the hereditaments called "my *Tedworth* estate."

Evidence was gone into as to the nature and circumstances of the property and of its acquisition, and evidence was also tendered to the effect that the restrictive words "in the county of *Hants*" formed no part of the instruc-

tions, but were introduced by the solicitor under a mistaken impression that the whole estate was in that county.

The effect of the evidence, so far as it was admissible, is fully stated in the judgment of the Court.

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Statement.

Mr. Rolt, Q.C., and Mr. Martindale, for the Plaintiff; and Sir Hugh Cairns, Q.C., and Mr. Lonsdale, for Defendants in the same interest :—

Argument.

First, on the construction of the whole will as it stands, the devise of the *Tedworth* estate includes the property in *Wilts* as well as that in *Hants*. The whole had been acquired and held by the testatrix's husband and his father as one estate, connected with the mansion which was the principal mansion of the family. No regard had been paid to the county boundary in parcelling out the tenancies; but farms, and even cottage gardens, were laid out so as to comprise lands in both counties, and the whole property was spoken of as the *Tedworth* estate.

The whole of this estate was insufficient to keep up the mansion, and the income had always been supplemented by the produce of the *Welsh* estates, which were of much greater value. The *Tedworth* estate is made the principal subject of devise in the husband's will, the *Welsh* estates having passed under a general residuary devise; and the whole scheme of the testatrix's will is to deal with the two properties in *Wales* and at *Tedworth*, of which she was possessed, and to augment the latter by a charge of £40,000, to be raised from the *Welsh* estates, and applied in the purchase of lands adjoining the *Tedworth* estate, which, it is to be observed, she speaks of in the singular, while the plural is used in describing the *Welsh* estates. The furniture and effects at *Tedworth* are made heir-looms, and everything points at the establishment of

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 —
Argument.

the family upon this property. The will abounds with provisions inconsistent with the idea that the *Tedworth* estate was meant to be dismembered; and it is loaded with actual and possible charges which might reduce its value to the proprietors to little or nothing, which the testatrix could not be supposed to contemplate when she allotted a heavy charge on the *Welsh* estates as an accretion to *Tedworth*, expressly by reason of the inadequacy of the value of the latter. The devise of *Tedworth*, moreover, is subject to annuities, which, in fact, were charged by the will of the testatrix's husband both on the *Hants* and *Wilts* property, and this without any intimation of an intention to sever the charge. Further, there is a general devise of all the manors in *Hants*, the fact being that the testatrix had only one manor in *Hants*, the others being in the *Wiltshire* portion of the estate.

All these circumstances taken together show that the words "in the county of *Hants*" are a mere *falsa demonstratio*, which the Court will reject: *Newburgh v. Newburgh* (a), *Sugd. Law of Prop.* (b), *Powell v. Mouchett* (c), *Abbott v. Middleton* (d), *Anstee v. Nelms* (e), *Hart v. Tulk* (f), *Key v. Key* (g), *Doe v. Chichester* (h), *Trimblestown v. D'Alton* (i).

Secondly, we are entitled to an issue whether the words "in the county of *Hants*" are part of the will. An issue may be granted as to particular words: *Hippesley v. Homer* (j), *Newburgh v. Newburgh* (k), *Taylor v. Brown* (l), *Lord Guillamore v. O'Grady* (m). Besides the issue expressly suggested by the bill, there might be an

(a) 5 Mad. 364.

(b) Pp. 197, 206, 367.

(c) 6 Mad. 216.

(d) 7 H. L. Cas. 68, 109.

(e) 26 L. J. (N. S.) Ex. 5.

(f) 2 D. M. & G. 300.

(g) 4 D. M. & G. 73.

(h) 4 Dow, 65.

(i) 1 Dow & C. 85.

(j) T. & R. 48, in not.

(k) *Ubi sup.*

(l) 10 W. R. 361.

(m) 2 Jo. & Lat. 210.

issue as to the whole clause from the words "my manors" to the words preceding "my *Tedworth* estate" inclusive, or from the words "in the county of *Hants*" following "manors, farms, lands, tenements, and hereditaments," down to the words in the parenthesis, "all which hereditaments in the county of *Hants* are," inclusive. Whichever of these corrections is adopted the effect is the same.

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Argument.

Mr. *Daniel*, Q.C., and Mr. *G. L. Russell*, for the trustees, followed in the same interest.

Mr. *Giffard*, Q.C., and Mr. *Hobhouse*, for the heir-at-law :—

There is no authority for such an issue as is asked in this case. It is in reality an attempt, under the pretence of striking out words, to put into the will a new subject of devise; and no case comes near to this. An issue as to a particular clause might perhaps be directed to ascertain whether there had been any fraudulent interpolation; but authorities to this effect have no application to a case like the present.

All the cases relied on bring one back to *Newburgh v. Newburgh*, and there the House of Lords decided on the point of construction, and not upon the supposed right to an issue. In *Abbott v. Middleton*, there was the same reason to ask an issue, but it was not attempted, and it is now a mere experiment on the Court for the purpose of letting in inadmissible evidence. It is clear, if an issue were directed, it would be useless, unless the evidence of alleged mistake were admitted; and it is quite settled that such evidence as that of the solicitor in this case is inadmissible. It is only to prove fraud and undue influence that parol evidence is admissible on an issue *devisavit vel non*.

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 —
Argument.

Then, as to the construction, the devise is most expressly limited to the county of *Hants*; and all the arguments for extending it only amount to this, that it would have been more likely that the testatrix should have dealt with the whole property—in other words, that the Court could make a better will for her than she has made for herself. The principle of rejecting words as “*falsa demonstratio*” applies only where the description is complete without them, *Sugd. Law of Prop.* (a), and that would not be the case here if the words “in the county of *Hants*” were struck out. *Hart v. Tulk*, may be an authority; for altering words which involve an absurdity; but there is nothing absurd in this will, if construed strictly as it stands.

[They cited *Miller v. Travers* (b), *Doe v. Hiscocks* (c), *Doe v. Gwillim* (d), *Wigram on Evidence* (e), *Drake v. Drake* (f).]

Mr. Rolt in reply:—

Supposing the omission of the words “in the county of *Hants*” to be equivalent to adding “in the county of *Wilts*,” there is no more difficulty in directing an issue in one case than in the other. When the issue is directed, it will be for the judge to exclude improper evidence; and at present I need not discuss what evidence would be admissible on the trial. It is enough that we have a case for an issue, and mistake is as good a ground for an issue as fraud or undue influence. We do not rely on mere evidence of intention, which I admit is inadmissible; but we do seek to prove that words have crept into the document which were no part of the will of the testatrix.

Then, as to the construction, there has been no answer given to our contention that *Hart v. Tulk* is directly in point.

- (a) Page 570.
- (b) 8 Bing. 244.
- (c) 5 M. & W. 363.

- (d) 5 B. & Ad. 122.
- (e) Prop. 7.
- (f) 8 H. L. Cas. 172.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This is a bill filed to obtain a declaration as to the construction of the will of *Matilda Ascheton Smith*, and also praying for an issue *devisavit vel non* to ascertain whether certain words formed part of the will of the testatrix.

On the latter point I have felt no hesitation from the first. It is clearly impossible to grant any such issue as the Plaintiff asks.

Authorities were cited; among others, *Hippesley v. Homer* and *Newburgh v. Newburgh*, from which it appears that in certain cases the Court will direct an issue whether particular words found in the instrument formed part of a testator's will. For the present I will put aside all cases of fraud, and refer only to those where the object has been to strike out some passage from a will on the ground of mistake. In *Powell v. Mouchett*, Sir J. Leach laid it down, that it was impossible to have an issue whether a clause was introduced by mistake; but that an issue might be directed whether a particular passage was really a portion of the will, putting as an illustration the case of a manifest interpolation. An issue, for the purpose of ascertaining whether certain words were in the will at the time of its execution, would be very proper. In the present case there is no dispute that the words which the Plaintiff desires to strike out were there when the will was executed, and the issue would only be to ascertain whether the solicitor who prepared the will introduced them by mistake. There is no authority for an issue under such circumstances; and, on the other hand, there are some observations of Chief Justice Tindal in *Miller v. Travers*, which are extremely pertinent, and, indeed, unanswerable. Referring to a proposal to introduce new words by evidence, the Chief Justice says, "If such evidence is admissible to introduce a new subject matter of devise, why not also to introduce the name of a devisee altogether omitted in the will? If it is admis-

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sible to introduce new matter of devise or a new devisee, why not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards intended by the Statute of Frauds would be entirely destroyed and the statute itself virtually repealed."

If property were devised to *A. B.* for life, an issue might be asked for the purpose of striking out the words "for life," and converting the interest into a fee simple. This would not be more absurd than striking out restrictive words for the purpose of enlarging the subject matter of a devise.

The other point, as to the construction of the will as it stands, is the really important question in the cause. The case is one of great singularity and extreme difficulty.

The effect of all the authorities up to *Abbott v. Middleton* (a) is very clearly summed up in Lord *St. Leonards'* judgment in that case. That was a will of personalty, which, however, except on one point, makes but a very slight difference. Lord *St. Leonards*, after expressing his anxiety to keep within the strict rules of law, and referring and declaring his adherence to what he had said in *Eden v. Wilson* (b), states the law in these terms:—"You are not at liberty to transpose, to add, to subtract, to substitute one word for another, or to take a confined expression and enlarge it, without absolute necessity. You must find an intention upon the face of the will, to authorise you to do so. When I say 'upon the face of the will,' you are by settled rules of law at liberty to place yourself in the same situation in which the testator himself stood. You are entitled to inquire about his family, and the position in which he was placed with regard to his property. I doubt

(a) 7 H. L. Cas. 68.

(b) 4 H. L. Cas. 257.

whether we should be justified in looking to the amount of the property, although it is referred to. I disclaim, at present, any intention whatever of referring to the amount of the property which he then possessed. It is personal property. He enumerates his property. He does not profess to dispose of it as constituting all his property. On the contrary, he makes his son residuary legatee. It would be dangerous, therefore, in my apprehension, to found the decision of this case judicially upon the amount of the property."

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The observations with respect to founding a decision on the amount of property, must be read as applied specially to a will of personalty; because there is no question that the value of real estate may be referred to as a means of arriving at the construction of a will.

In the present case, therefore, it appears to me that I am not entitled to direct an issue as prayed by the bill, or to admit the slightest evidence of what the testatrix's intention was; but I am at liberty, and I am bound, to see whether, having regard to the nature of the property and the circumstances surrounding the testatrix, I should be justified in striking out, in effect, from the will, words which amount to a limitation of the subject of devise. There is no question that the clause containing the immediate devise is in terms expressly limiting the property devised to land in the county of *Hants*. The devise is, of "my mansion-house in the county of *Hants*, and all my manors, &c., in the county of *Hants*, devised by the will of my late husband, and all my other hereditaments in the county of *Hants*, over which I may have a disposing power (all which hereditaments in the county of *Hants* are hereinafter described or referred to as my *Tedworth* estate)."

So far as the words of this clause go, the devise is

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clearly limited to property in the county of *Hants*. The question is, whether property adjoining and connected with this estate, but situate locally in the county of *Wilts*, can be held to pass by the devise.

Now, among the circumstances to which I am entitled to look, are the situation and value of the property; and I will state the facts bearing upon this, which, on a careful examination of the admissible evidence, I consider to be proved.

Thomas Assheton Smith, the elder, was the owner of a capital messuage in the parish of *Lower Tidworth*, in the county of *Hants*. He was also the owner of certain farms, comprising the whole parish of *Lower Tidworth*, with the exception of the glebe. The entire parish is in the county of *Hants*. He was also the owner of the manor of *South Tidworth*, situate in the county of *Hants*, and of the manor of *North Tidworth*, situate in the county of *Wilts*. He was also the owner of several farms in the parish of *Upper Tidworth* in the county of *Wilts*. There is no distinct evidence how these several properties were acquired, nor does it appear that he was possessed of any leasehold property. He died in 1828, and was succeeded in the property by his son, also named *Thomas Assheton Smith*.

Thomas Assheton Smith, the son, bought another estate, consisting of the manor and estate of *Tedworth Zouch*, situate in the parish of *Upper Tidworth*, in the county of *Wilts*; and it is stated that he farmed nearly the whole of the parish of *Upper Tidworth*. He also purchased a lease of certain tithes and glebe, and purchased and enfranchised a lease of chapter lands comprising the site of the manor of *South Bellenger*, in the county of *Hants*. This property did not comprise any manorial rights, but merely the site of the old manor. It was not a manor.

The material facts relating to the situation and character

of the property are these: The parishes of *Lower Tidworth* and *Upper Tidworth* adjoin each other, and the lands, held as I have stated by the father and son in the two parishes, were also, for the most part, adjoining and continuous. The *Hampshire* property comprised only one manor, that of *South Tidworth*, and included the mansion-house, a park, and 3,500 acres of land, exclusive of the house, gardens, and park. The rental of the freehold portion of this property is £1,650, and of the leasehold £287. The *Wiltshire* property consists of two manors, *North Tidworth* and *Tedworth Zouch*, and 3,054 acres of freehold land in the parish of *Upper Tidworth*, the rental of which is £1,600. It also included tithes of the annual value of £950, held on lease.

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There is no distinct boundary of the counties on the *Assheton* property, and one of the principal farms, comprising 1,200 acres (which had been held as a single farm under one tenancy as long as a witness seventy-two years old, and acquainted with the estate for the last fifty years, can carry back his information), consists of about 650 acres in the county of *Wilts*, and 550 in the county of *Hants*. About five years ago an alteration was made in the boundary of this farm, by taking away 120 acres of the *Hampshire* land, and 20 acres of the *Wiltshire* land, and throwing them into an adjoining farm. There were also two cottages on the property, the gardens of which lay partly in one county and partly in the other.

There are other facts proved with respect to the property, which are no doubt admissible, but of less importance. The two parishes of *Upper* and *Lower Tidworth* have been held for the last thirty years by the same incumbent, and have had one school, the expenses of which and of the roads through both parishes have been defrayed by the owners of the *Assheton* property.

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Thomas Assheton Smith, the son, was also at the date of his will and of his death the owner of a mansion house at *Vaenol*, near *Bangor* in *Wales*, and of property in the same district of much greater value than the *Hampshire* and *Wiltshire* property.

These are all the external facts which are in any way material.

Thomas Assheton Smith, the son, made his will, dated July 22nd, 1857. Thereby he described himself as of *Tedworth House* in the county of *Southampton*. He gave a number of annuities, which he charged upon all his "lands and hereditaments at or near *Tedworth*." Then he devised "all my lands and hereditaments at or near *Tedworth* aforesaid" to his wife in fee; and then left all other his real and personal estate to his wife absolutely. *Tedworth* is thus separated from the other property and specifically devised to the widow, charged with the annuities, the *Welsh* estates being also given to her by force of a general residuary devise. The testator died on September 15th, 1858.

I now come to the will of *Matilda Assheton Smith*, the construction of which is the question in the cause. The whole of the will of the testatrix requires to be carefully considered, as well as the position in which she stood at the time.

She found herself the owner, under her husband's will, of two large properties—the *Welsh* estates, which were the larger, and the property at *Tedworth*. It does not appear in evidence that she had any other property except a house in *Belgrave-square*. Considerable stress was laid in argument upon the alleged use of the term *Tedworth* estate to signify the whole of the property about *Tedworth*; but there is no evidence of the testatrix having so used the expression; and, indeed, such evidence has been held in *Doe v.*

Chichester (a) not to be admissible. It appears to me to be of small importance to make out that the testatrix was in the habit of so calling the estate ; but I think it is of some importance to consider what in common parlance the estate would be called. Now, bearing in mind that there was a large continuous property, situate in two parishes, each being called *Tidworth*, with the capital mansion known by the name of *Tedworth*, with the boundaries between the two counties disregarded in the laying out of one of the principal farms in the manner I have already described, and in the arrangement of the cottage gardens, there can be no doubt that by the term *Tedworth* estate simpliciter every one would assume the whole property to be meant. Any one who found a property so situated and so dealt with, on hearing the *Tedworth* estate spoken of, would take it for granted that the entire property was referred to.

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Mrs. *Assheton Smith's* will contains no residuary devise, and the scheme of it is to deal, first with the *Welsh* property, and then with the *Tedworth* estate. She describes herself as "of *Vaenol* in the county of *Carnarvon*, and of *Tedworth* in the county of *Hants.*" Then comes the devise of the *Welsh* estate, which contains some remarkable expressions. She devises the mansion house at *Vaenol*, and all the manors, messuages, farms, slate quarries, lands, tenements, and hereditaments in the principality of *Wales*, devised by the will of her late husband, and all other hereditaments in the said principality, if any, which she might be entitled to at her death ; indicating a desire to sweep in everything which she might possess in *Wales*, to the use of *Drummond* and *Best*, described as "the trustees for my *Tedworth* estate hereinafter devised," for a term of 500 years. But for what follows in the subsequent part of the will, there could be no doubt that the term "*Tedworth* estate" here used, would have to be construed so as to include the

(a) 4 Dow, 65.

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whole property in *Hants* and *Wilts*. If the testatrix had possessed nothing but the one farm which I have described, and had spoken of "my *Tedworth* farm," the term would clearly include the whole farm. No one could suppose half the farm to be referred to, nor would there have been any approach to the difficulty of this case, even if she had devised the farm with the description super-added "in the county of *Hants*."

The trusts of the term of 500 years are to raise a sum of £40,000, "which I intend to be an addition to my *Tedworth* estates hereinafter devised;" an expression which refers one to the subsequent part of the will, upon which the present question arises, and to which I may now proceed. The devise runs thus:—"I give and devise my mansion house at *Tedworth* in the county of *Hants*, and all my manors, farms, lands, tenements, and hereditaments in the county of *Hants* devised to me by the said will of my said late husband, subject to the annuities charged thereon by such will, and subject to an additional or further annuity of £50 per annum, to be paid to *Atwell*, the valet of my late husband, during his life, as hereinafter mentioned, and all other hereditaments in the said county of *Hants* of or to which I shall be seised or entitled, or as to or over which I shall have a disposing power by any will at the time of my death (all which hereditaments in the county of *Hants* are hereinafter described or referred to as my *Tedworth* estate)," to the uses hereinafter contained.

Upon these words, of course, an enormous difficulty presents itself at once in the way of the Plaintiff's contention. The heir has a right to say, "The testatrix had a manor in *Hampshire*, and an estate comprising almost the whole of the parish of *South Tidworth* in that county, and this property fully answers the description contained in the will. That being so, how can a different interpretation be admitted?" Now I am not at all disposed to

conclude this matter. It appears to me a case in which the heir ought to be at liberty to bring an action of ejectment, and the trustees to defend it. There is, I think, a strong *prima facie* case, sufficient to justify such proceedings.

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The answer to the heir is undoubtedly also of a very strong character, and I have seldom had to consider a case which caused me so much anxiety and doubt. I have formed my opinion as to the right construction of the will; but, for the present, all that it is necessary to determine is, that there is ample ground to justify the trustees in defending an action.

The arguments in favour of giving to the devise a more extended sense than the words by themselves would bear, are as follows:—The testatrix describes herself by reference to two mansion houses; and when she speaks of her *Welsh* and *Tedworth* estates, any one who used or heard the terms would naturally understand the whole of each of the two properties to be included, and certainly would not imagine that such a phrase would be used in such a sense as to include one-half of an entire farm or of a cottage garden.

Then it is to be observed, that the testatrix uses the word 'manors' in the plural, although she had but one manor in the county of *Hants*; and the argument founded on this, though it would be of little weight by itself, is not altogether worthless when coupled with the other circumstances in the case. At the same time, it could not be contended that the mere use of the plural word would be sufficient to pass a manor wholly unconnected with the *Tedworth* estate; but seeing the large general words which the testatrix uses in dealing with the property, it would be very strange that she should at the same time contemplate the division of the principal farm on the estate. Again, in the later portions of the will, some very strong indications are

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to be found. In the primary devise itself, she refers to the property devised by her husband's will as subject to the annuities charged thereon by such will, without the slightest indication of an intention to divide the charge, which, as created by her husband, was upon the whole estate. And subsequently she gives an additional annuity charged upon "all my hereditaments at or near *Tedworth*," following in this instance the words of her husband's will, which would include the whole property. This of course is open to the observation that the testatrix, when she meant to include the whole property, knew how to use an appropriate description; but there is nothing in the will to favour the notion that the testatrix considered the annuities to be charged on the whole estate, and the devise to be limited to part of it.

It is true, that these circumstances alone, like all the other matters relied on, would be insufficient to control the meaning of the devise; but the force of such considerations as evidence is cumulative, and not to be compared to the multiplication of independent weak arguments which carry a case no higher than the strongest of them by itself.

Moreover, there is no doubt, that, with reference to real estate, the amount ought to be taken into consideration. The *Hampshire* portion was of the value of £1,600 a-year, and was already charged with annuities of £650, to which the testatrix adds another annuity of £50. She gives jointuring powers to the extent of £500 to each tenant in possession, with a limitation to a maximum of £1,000 at one time. If these powers were exercised to the full extent which the testatrix contemplates as possible, there might be anticipated an aggregate charge of £1,000, though it would not be likely ever to exceed that amount, as the annuities might be expected to drop before a second jointure was charged.

Then she increases the estate by a sum of £40,000 to

be charged on her *Welsh* property in favour of *Tedworth*, but she gives power to every tenant for life to charge portions for children, which may amount to £20,000 in each family, subject to the proviso that not more than £40,000 shall be charged at any one time. She contemplates, therefore, the possibility that the whole accretion of £40,000, together with £1,000 a-year of the income of *Tedworth*, may be exhausted, leaving only £600 a-year as the income of the tenant for life of the mansion, at the same time evidently treating *Tedworth* as the central habitation of the family, by making the furniture heirlooms, and otherwise, although it is true there is no express injunction to keep up the mansion. She evinces the clearest possible intention of founding a family on this estate; and there is a remarkable direction, that the maintenance allowed to minors shall be on the most liberal scale, which would leave little margin for accumulations during minority out of an income which might be only £600 a-year. It would be strange, that that which is throughout dealt with as the favoured estate should be left in such a position. All these are circumstances not to be overlooked, however inadequate each might be alone to control the terms of the original devise. The directions as to the application of the £40,000 which is to be taken out of the *Welsh* property for the benefit of *Tedworth* are also worthy of notice. The trustees are directed to lay out this sum "in the purchase of freehold lands and hereditaments, near to or adjoining my said *Tedworth* estate, or elsewhere in the county of *Hants* or in some adjoining county or counties, of an indefeasible estate of inheritance, which lands and hereditaments so to be purchased shall be an accretion to my said *Tedworth* estate, and shall be conveyed or assured and limited or settled to the same uses." The argument founded on the charge of £40,000 works both ways. The other provisions would be much more incredible if the £40,000 had not been added to make them practicable. On the other hand, when you

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find a direction to purchase property near the estate, in *Hants* or any adjoining county, it is impossible not to feel the weight of the argument thus supplied against an intention first to sever the original estate, and this by so singular a division of the property as the county boundary would effect. Briefly to sum up the points of the Defendant's case :

First, the testatrix had two properties—one in *Wales*, the other in *Hants* and *Wilts*—which last might fairly be described as her *Tedworth* estate; and the will must be approached with the *prima facie* presumption that in speaking of her *Welsh* estates and her *Tedworth* estate the testatrix would mean the whole of these respective properties. Secondly, the words of gift, though coupled with the description “in the county of *Hants*,” show no indication of an intention to dismember the estate, though the effect of limiting the devise to the county of *Hants* (there being no residuary devise) would be to sever the property by a line through the middle of one of the farms, and leave one part to go to the devisees and the other to the heir. Thirdly, the testatrix deals with a property, which, on the limited construction, may be reduced in value to £600 a-year, and, at the same time, evidently intends the mansion to be kept up, and directs the furniture and effects to be preserved as heirlooms. Fourthly, she devises the estate (not, it is right to say, as part of the description), but still so that it must be taken subject to annuities charged thereon, and also to a further charge, the facts being, that those annuities stood charged upon the whole property, and that the further charge which she herself creates by the will is also upon the whole.

Putting all these circumstances together, I turn to the authorities to ascertain how the law ought to be applied to such a case.

I find it constantly said—more especially by Lord *Wens-*

leydale—that you must look, not to the intention of the testator, but to the meaning of the words which he has used in his will; but this must certainly be understood as signifying the meaning of all the words of the will read by the light of the surrounding circumstances, or, to apply the apt observation I have already cited of Lord *St. Leonards*—the intention to be found on the face of the will signifies an intention to be so discovered after you have placed yourself in the same situation in which the testator himself stood. Taking Lord *Wensleydale's* maxim with this qualification,—what the Court has to do is to inquire, not simply into the meaning of a particular passage, but into the meaning of the whole will. There are abundant authorities which establish and illustrate this principle. In *Mosley v. Massey* (a) the will contained a recital that the testator was seised in fee of an estate in the county of *Radnor*, and had settled an estate in the county of *Monmouth*. On turning to the settlement, it appeared that the fact was exactly the reverse—that the *Monmouth* estate was unsettled and the *Radnor* property was the settled estate. On the strength of this explanatory circumstance the Court interchanged the words *Radnor* and *Monmouth* throughout the will. I refer to the case not as otherwise coming near to the present, but as an illustration of the rule, that you must not look to the words of a particular passage only, but to the language of the whole will, and to the external facts of the case.

Hart v. Tulk (b) is a much stronger instance of the application of the same principle. The words “fourth schedule” were read as “fifth schedule” solely upon the general contents of the will as applied to the circumstances of the property. This is a very important decision in its bearing upon the case before me. The Lord Justice *Knight Bruce*, after observing that the strict construction of the passage would make the will eccentric and capricious,

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(a) 8 East, 149.

(b) 2 D. M. G. 300.

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and adding that testators have a right to be eccentric and capricious, states the ground of his judgment to be not merely that the clause, as it stood, was startling or ridiculous, but that the case had that ingredient and something more. "The other parts of the will show evidently and explain, that, in the passage in question, the word 'fourth' was written inadvertently and without meaning, or in sheer mistake, by a mere error of the pen."

Then I come to the strong case of *Newburgh v. Newburgh*, before the House of Lords, reported in Lord *St. Leonards'* Law of Property. This was a very important decision in some respects; and it is to be observed, that every part of the will might have been satisfied without altering the meaning of the words. The point was, really, no more than this: The testatrix devised to trustees for 2,000 years, on trust to raise legacies, estates in *Sussex* and *Gloucestershire*; and then declared uses of the *Sussex* estates only to his wife for life, with limitations to her children in strict settlement; and then, in default of such issue, devised both the *Sussex* and *Gloucester* estates to uses in strict settlement in favour of other branches of the family.

The House of Lords came to the conclusion that the *Gloucester* estates might be included in the devise to the wife, from the cumulative force of a number of independent considerations, no one of which alone would have sufficed to establish that view.

There was a name and arms clause, which directed that the several persons thereinbefore made tenants for life or in tail of his real estates thereinbefore devised in the said counties of *Sussex* and *Gloucester*, "except the said Countess of *Newburgh*," should take the name and arms of *Kemp*. It was obviously possible to read that, *reddendo singula singulis*, without necessarily implying a gift to the Countess of the *Gloucester* estates.

The next reason was, the postponement of a charge of £2,000, on the estates in both counties, till the death of the Countess of *Newburgh*. This might seem an eccentric provision, when the Countess took only one of the estates ; but still there was no absolute necessity to imply a gift to her of the other estate. It is clear that this ground alone would not have justified the decision.

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Then there was a leasing power granted to Lady *Newburgh* and others, worded in this way :—" that the Countess of *Newburgh* during her life, and after her decease the several persons who by virtue of the limitations therein-before contained should for the time being be entitled to the actual freehold of the said estates in the said counties of *Sussex* and *Gloucester*, or the actual freehold of the said estates in the county of *Northumberland* " should have power to lease. That might well apply in the case of the Countess to leases of the *Sussex* estate ; and so, if you examine every separate feature of the will, as, for example, the devise being subject to legacies, just as here it is subject to annuities, you do not find any single consideration of sufficient weight to control the words of the devise. It was the combination of all these circumstances which led the House of Lords to the conclusion that the *Gloucester* estates were to be included in the gift.

After the observations of Lord *St. Leonards*, to which I have already referred, it is not necessary to discuss at length the class of cases which establish the principle, that you are entitled to look at the will and the circumstances of the case together, as a means of arriving at a sound construction. The authorities on this subject amount to this, that if you can from all the expressions used throughout the will, together with the surrounding circumstances, arrive at a clear intention, then and then only are you entitled to strike out or alter qualifying words, as was done with the

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words "fourth schedule" in the case of *Hart v. Tulk*, with the words descriptive of the occupation of the farm devised in *Goodtitle d. Radford v. Southern* (a), and with the word "freehold" in *Day v. Trig* (b).

The question, therefore, to be considered is this: Can you arrive at the conclusion that the thing given was the whole *Tedworth* estate, and that the expression "in the county of *Hants*" was not added with the intention of specifically limiting the gift, but was a mere falsa demonstratio? That is what the jury will have to determine. I should add, that I have grave doubts whether this Court has power, in a case of this description, to make a special declaration against the heir of the construction to be put on the devise of a strictly legal estate. This is not a case of establishing a will, because the heir admits it. If I were bound to decide the question, I should make a declaration that the whole *Tedworth* estate passed by the will. If the heir elects to remain, I shall simply direct the trusts to be carried into execution, with liberty to the trustees to defend any action of ejectment by the heir. But the heir, if he prefers it, may be dismissed with costs; and in that case I think that the trustees, though they have no equity against the heir, have a right to ask me of what their trust estate consists, and I shall state on the face of the decree my opinion that the *Tedworth* estate passed by the will.

Mr. *Giffard*, for the heir, elected not to be dismissed.

Minute of
 Decree.

DIRECT the trusts of the will to be executed. The trustees to be at liberty to defend any action of ejectment which the heir may bring.—Retain the bill for a year against the heir.—Liberty to apply.

(a) 1 M. & Sel. 299.

(b) 1 P. W. 286.

GIPPS v. HUME.

THIS was a demurrer to a bill to enforce an agreement, by way of compromise, of a divorce suit. The facts, as alleged, were as follows :—

The Plaintiff had instituted proceedings in the Divorce Court for a dissolution of marriage, joining the Defendant as co-respondent, and he believed that he could have proved the adultery. Before the hearing, an agreement was entered into, by which the Plaintiff undertook to withdraw the suit in consideration of £3,000 paid by the Defendant, and of the Defendant's agreement to secure a further sum of £4,000 and interest, payable on the death of his (the Defendant's) mother, and to execute the necessary documents within a month, which time had elapsed before the filing of the bill.

The Plaintiff applied for leave to withdraw the record, which was refused; and the case being brought on, the Plaintiff adduced no evidence, and the petition was dismissed.

The bill prayed specific performance of the agreement to secure the £4,000.

Mr. *Hanson* and Mr. *Lopez*, for the demurrer:—

First, the agreement is against public policy. Any damages recovered would have been applicable, if the Court so directed, for the benefit of the children or the maintenance of the wife: 20 & 21 Vict. c. 85, s. 33; and it was not competent to the Plaintiff to compromise the claim for a pecuniary benefit to himself. This would introduce all the mischief of the old action of criminal conversation, and might give encouragement for collusion between the husband and

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Nov. 15th.

Divorce Act—
(20 & 21 Vict.
c. 85)—

Damages—
Compromise—
Public Policy.

An agreement by a petitioner in a suit for dissolution of marriage, to withdraw from the suit in consideration of a sum of money paid and to be secured by the co-respondent, is a fraud on the statute, and void as against public policy.

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wife to entrap a third person into the position of the Defendant in this cause. The consideration for the agreement was immoral, and no action or suit can be founded on it. Moreover, the stipulation that the Plaintiff should abandon his suit, was impossible, and contrary to law: *Gray v. Gray* (a), *Ryder v. Ryder* (b), *Rowley v. Rowley* (c).

The bill is also demurrable on other grounds. The Plaintiff has not performed his undertaking to withdraw the suit; the agreement is too vague to be enforced, as the nature of the document by which the money is to be secured, is not specified, and the remedy, if any, is clearly by an action at law.

Sir *H. Cairns*, Q.C., and Mr. *Southgate*, for the bill.—
 There is no principle of public policy to compel a man to prosecute a divorce suit to the end.

The case of *Gray v. Gray* does not apply, because there the Queen's Proctor had intervened, and the petitioner was no longer at liberty to put an end to the proceedings. It is quite clear, that, whenever a Plaintiff is entitled to damages, if he succeeds in a suit, he may agree with the Defendant to ascertain the amount, and take a fixed sum, instead of leaving the amount to depend on the verdict of a jury. A crim. con. action under the old law might have been so compromised, and the new proceedings against a co-respondent are in the same position. It is true, the Court might possibly direct an application of the damages for the benefit of the children; and the Plaintiff is quite willing that it should be made part of the decree, that he should make such settlement as this Court may think proper. This removes any difficulty on that ground; and it is to be observed, that, although other persons may take an interest in the

(a) 30 L. J. Prob. 119.

(b) 30 L. J. Prob. 164.

(c) 30 L. J. Prob. 164, in note.

damages when recovered, it is entirely at the option of the petitioner whether he will proceed for damages or not; and the Court has no control over them till after the verdict. The petitioner had a right which he could enforce or not at will, and such a right may always be compounded for a fixed sum as liquidated damages in lieu of trusting to the chances of a jury.

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v.
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Argument.

The Plaintiff has withdrawn from the suit in the only practicable way, and has substantially performed his part of the agreement in good faith.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I am clearly of opinion that this contract is void on the ground of its contravening public policy.

Judgment.

Before the passing of the Divorce Act a husband was allowed to bring an action against an adulterer. When the Act was passed, the question was much considered, whether it was desirable that anything of the kind should be permitted; and the statute as passed only allowed damages to be recovered from a co-respondent on the condition that the disposal of them should be under the control of the Court. The 33rd section enacts, that the husband may proceed against the adulterer for damages, but with a proviso that in every case (although the respondents may not appear) the damages shall be ascertained by the verdict of a jury; and that, after the verdict, the Court shall have power to direct in what manner such damages shall be paid to the Plaintiff or applied, and to direct the whole or any part to be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife.

1861.
 {
 GIFFS v.
 HUMPH.
 Judgment.

The Plaintiff, therefore, could not have recovered damages except by proceedings under which the whole might have been settled on his children, or otherwise applied as the Divorce Court should direct; and it would not be consistent with public policy for this Court to lend itself to a scheme by which he has sought to pocket the price of his own shame. It is by no means certain on the allegations of the bill that the Plaintiff could have succeeded in his suit. He says only that he believes he could have proved the adultery, not that he could have obtained a divorce. But apart from this, I think it clear that the agreement was in fraud of the Act of Parliament, and, therefore, against public policy. There is much weight in the suggestion, that, if bargains of this kind were sanctioned, there would be a possibility of collusion for the purpose of bringing about such a result; but I do not think it necessary to press this point, as it is sufficient to say that the obvious policy of the Act is to prevent any one from recovering damages for the adultery of his wife, except subject to the control of the Court. The demurrer must, therefore, be allowed.

1862.
 {
 June 2nd, 16th.
 Fixtures—
 Landlord and
 Tenant.

Greenhouses
 built in a gar-
 den and con-
 structed of
 wooden frames
 fixed with
 mortar to
 foundation
 walls of brick-
 work—*Held*,
 to be fixtures, and not removable by the occupier who built them.

JENKINS v. GETHING.

THIS was a bill filed to restrain the removal of certain buildings claimed by the Plaintiffs as fixtures.

The Plaintiffs represented the firm of *Edward Jenkins & Co.*, tin-plate manufacturers, of which the Defendant *W. Conway James* had been a managing partner from the

A boiler built into the masonry of the greenhouse also *held* to be irremovable; but the pipes of a heating apparatus, which were connected with the boiler by screws, *held* to be removable.

year 1835, until his resignation shortly before the filing of the bill, part of his remuneration consisting of the occupation, rent-free, of a house and garden at *Pontnewydd* in *Wales*, belonging to the partnership.

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JENKINS
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GETHING.
—
Statement.

At various times during his occupancy the Defendant had built the following erections :—

1. A greenhouse and hothouse forming one building together, with a forcing-house attached to the back wall of the greenhouse. This building stood upon foundation walls built into the ground, to which the upper framework was attached in the usual way by a course of mortar. There was also a dividing wall of brickwork between the greenhouse and hothouse. The outer brick walls were about five feet high at the back, and from two to three feet in front.

2. A greenhouse or vinery of similar construction, the brickwork being nine feet high at the back, and having a propagating house of brick and stone attached to it in the rear. There were vines growing in the vinery.

3. Various pits formed of wooden framework affixed by mortar to low brick foundations in the same manner as the greenhouses.

4. A boiler built into the floor of the greenhouse with a system of heating pipes connected with it by screws.

In 1861, it was resolved to wind up the partnership, and the Defendant *James* resigned his appointment as manager.

On May 31st, 1861, the Defendant *James* assigned all his property to the Defendants *Gething* and *Conway*, as trustees for his creditors.

On February 22nd, 1862, the trustees advertised for sale the two greenhouses, the pits or frames, and the heating apparatus

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 v.
 GETTING.
 ———
Statement.

The Plaintiffs claimed these particulars as fixtures, and also alleged that the buildings had been in part constructed with materials belonging to the partnership.

Argument.
 ———

Mr. *Amphlett*, Q.C., and Mr. *Charles Hall*, for the Plaintiffs:—

It is beyond dispute that all these erections are actually affixed to the freehold, except, perhaps, the pipes screwed to the boiler, which are of very trifling value. But even these, though not so fixed as to be irremovable without injury, are mere adjuncts of the boiler, which is permanently fixed.

It cannot be pretended that the case is within the exception allowed in favour of trade. It is the common case of landlord and tenant, as to which the same rule applies as to the case of an heir or reversioner—viz. that all the fixtures go with the freehold, and are irremovable: *Buckland v. Butterfield* (a), *Elwes v. Maw* (b), *Fisher v. Dixon* (c), *Mather v. Fraser* (d).

There are also the additional circumstances, that the removal is attempted after the expiration of the tenancy, which would not be legal even if the particular buildings were removable during the tenancy, and that the materials of the buildings belonged in part to the Plaintiffs.

Mr. *James*, Q.C., and Mr. *Whitbread*, for the Defendants:—

All the authorities relied on are cases between the heir and the executor; but the law has undergone much relaxation as between landlord and tenant, and recognises a large

(a) 2 Brod. & B., 54.
 (b) 3 East, 38.

(c) 12 Cl. & F. 312.
 (d) 2 K. & J. 536.

class of tenant's fixtures which are really affixed to the freehold, but are nevertheless removable by the tenant. For example, stoves are removable, and a pump was held removable in *Grymes v. Boweren* (a), to which the boiler in this case is very analogous. The true principle in all these cases is, that the tenant may remove everything which can be removed without injuring the freehold: *Amos* on Fixtures (b), *Avery v. Cheslyn* (c). Even among the early authorities, (the *Dutch Barn case*) *Dean v. Allalley* (d) is in point with respect to the greenhouses, which are similar in construction to the barn, except that there is a course of mortar, the removal of which would involve no injury, in place of uprights fixed in the brickwork. So, also, *Culling v. Tufnull* (e). *Buckland v. Butterfield* is quite distinguishable, because there the greenhouse held to be irremovable was an adjunct, and actually part of the house itself, instead of being, as here, an independent building in the garden.

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—
Argument.

But the case is concluded by the recent decision of *Martin v. Roe* (f), which establishes the right to remove fixtures of this description. It is true, that was a case between successive incumbents, but the same reasoning and the same rule apply between landlord and tenant. [They also cited *Wansbrough v. Maton* (g).]

Mr. *Amphlett*, in reply :—

The test stated by Mr. *James* is only correct to this extent, that a tenant cannot remove anything if the removal would injure the freehold ; but the converse is not true, for it would, in many cases, be easy to remove a house and yet leave the freehold uninjured in its original state.

The only ground on which fixtures, not being trade fix-

(a) 6 Bing. 437.

(b) 2nd Edition, pp. 74, 75, 81.

(c) 3. Ad. & Ell. 75.

(d) 3 Esp. 11.

(e) Bull. N. P. 34.

(f) 7 Ell. & Bl. 237.

(g) 4 Ad. & Ell. 884.

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 —
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tures, are removable by a tenant is, that they are within the class of ornamental fixtures ; but a greenhouse with brick walls built into the ground cannot, as a whole, be treated as an ornamental adjunct to anything ; and if it is suggested that the foundation walls may be left and the frames removed, the answer is, that the frames and the walls are parts of one thing, and that you cannot in any case remove half a chattel in the character of an ornamental fixture. The ornamental fixture to be removable must be a complete thing in itself. The *Dutch Barn* case is wholly inapplicable. It was a case of trade fixtures, or at least so treated.

Then, as to *Martin v. Roe*, the whole decision turns upon the distinction between the case of successive incumbents, and that of landlord and tenant. There is nothing in common between the two.

June 16th.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question in this case is, whether the Defendants, who represent the interest of a former occupier of a house and garden at *Pontnewydd*, are entitled to remove certain structures claimed as fixtures by the owners of the freehold. They consist, for the most part, of erections in the garden, which are not attached to the house. There is a greenhouse, a vinery, a brick and stone building called a propagating house, and a melon pit, and other similar pits.

It has surprised me to find how meagre the authorities are upon the subject, possibly for the reason that the law is considered to be settled. The cases chiefly relied on were *Martin v. Roe* (a) on the one side, and *Buckland v.*

(a) 7 Ell. & B. 237.

Butterfield (a) on the other. The buildings which were the subject of this last decision, were, in most respects, substantially of the same kind as those in dispute in the present case. We have here a greenhouse standing on brickwork five feet high at the back, and two or three feet high in front; and it has not been attempted to say that such a building can be treated otherwise than as a fixture, though it has been argued that it is a fixture removable by a tenant. Then there is a vinery nine feet high at the back, with vines growing in it, which the occupier, not being a gardener, is clearly not entitled to remove. There are some other buildings of a more doubtful character, being pits at a small elevation from the ground, and also what is called a propagating house built of brick or stone. In *Buckland v. Butterfield* the conservatory, which was held to be a fixture and irremovable, stood upon a brick foundation fifteen inches high. Prima facie this case appears to be rather stronger in favour of treating the buildings as fixtures than that of the conservatory in *Buckland v. Butterfield*, as there might be a question there as to whether the conservatory was not an ornamental adjunct of the house, whereas these buildings are affixed not to the house, but to the garden.

It is true that the law, originally derived from old authorities founded on the notion that the freehold was not to be touched, has been much relaxed as between landlord and tenant, and also in other cases in favour of trade; but this principle is quite different from that which formed the ground of decision in *Martin v. Roe*. If the state of the law permitted it, it would seem no doubt much more satisfactory to apply the rule laid down in that case to questions arising between landlord and tenant; but this authority has really no bearing on the present case. The decision

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v.

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was, that it was waste on the part of an incumbent to erect buildings which he was not bound to erect, as by so doing he might subject his successor to liability for dilapidations; and consequently the incumbent and his executors were considered entitled, if not bound, to remove such erections. It would be a very sensible rule in all cases to hold that every occupier is entitled, and bound if required, to remove everything which he has built, and to restore the property to the condition in which he found it; but whatever may be the case with regard to an incumbent, that is not the law applicable to an ordinary tenancy. *Martin v. Roe*, therefore, appears to have no application; while there is nothing to distinguish this case from *Buckland v. Butterfield*. I am therefore bound to hold that all these erections, which are undoubtedly fixed to the ground, are what the law calls fixtures and are not removable.

With respect to the boiler, that seems, according to the authorities, to be a fixture. It is not like a pump, easily removable. The question as to the hot water pipes is more doubtful. Although they are used as the means of circulating the water from the boiler, still they are connected merely by screws, and might very naturally and easily be altered from time to time, like gas fittings, and can hardly be treated as mere adjuncts of the boiler. It is a matter of comparatively small importance; but I think upon the whole that I must hold the pipes to be removable by the occupier.

With this exception there will be a perpetual injunction against the removal of the erections claimed by the Plaintiffs. The costs will follow the event.

1861.

1929. 820.
2cl. D. 382

RE HOLMES.

Nov. 15th, 19th.

THIS case came on upon the demurrer of the *Attorney-General* to the petition of right of *J. M. Holmes* and others, under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34). The petition was addressed to the Queen's Most Excellent Majesty, and the material statements were to the following effect :—

The object of the petition was to obtain the restoration to the suppliants of so much of the land situate within or near to the city of *Ottawa*, late *Bytown*, in *Upper Canada*, formerly taken by Her Majesty's Ordnance Department from the predecessors in title of the suppliants under the authority of the *Rideau Canal Act* for the uses of the said canal, as had not been used for that purpose.

By two grants from the Crown, dated May 20th, 1801, and June 10th, 1801, certain tracts of land, including the land in question, were granted to *Grace M'Queen*.

On February 17th, 1827, an Act of the Provincial Parliament of the then province of *Upper Canada* (8 Geo. 4, c. 1), known as the *Rideau Canal Act*, was passed, which recited that His Majesty had been pleased to direct measures to be immediately taken under the superintendence of the proper military department for constructing

the land taken as had not been used for the canal, should be restored to the owners. By a third Provincial Act the lands were re-vested in the Queen for the purposes of the colony, and subject to future colonial legislation.

To a petition of right by suppliants claiming the restoration of certain lands taken for the canal from their predecessors in title, but not used, a demurrer was allowed on the ground that the Courts of this country had no jurisdiction.

Petitions of Right Act (23 & 24 Vict. c. 34)—Jurisdiction—Colony—Land.

Where land in a colony is vested in the Queen by a Colonial Act for the public purposes of the colony, the Petitions of Right Act, 1860, does not give jurisdiction to the Court of Chancery to entertain proceedings against the Crown as a trustee of such land present within the jurisdiction of the Court.

By a Canal Act of the Provincial Legislature of *Canada*, land taken for a canal was vested in the Queen. By a second Provincial Act the land so taken was vested in the officers of Her Majesty's Ordnance; and it was enacted that so much of

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the said proposed canal, and that the same would tend to the security of the province, and promote its agricultural and commercial interests; and that it was therefore expedient to provide by law any necessary facility for the prosecution of the work; and empowered the officer employed by His Majesty to superintend the said work, to explore the country, to enter on the lands of any person or persons to survey and set out such parts as he should think necessary and proper for making the canal, locks, and other works, and to construct the said canal, locks, and other works, as he should think requisite and convenient for the purposes of the navigation, and to maintain, repair, and alter the same, and also to construct, make, and do all other matters and things which he should think necessary and convenient for the making, effecting, preserving, improving, completing, and using the said canal, in pursuance and within the true meaning of this Act, doing as little damage as might be in the execution of the several powers to him granted.

By the 2nd section power was given to the said officer, after any lands should have been set out and ascertained to be necessary for making and completing the said canal and other purposes and conveniences before mentioned, to contract, compound, compromise, and agree with all persons for themselves, or as trustees for persons under disability, or others who should occupy, be possessed of, or interested in any lands set out or ascertained as aforesaid, for the absolute surrender to His Majesty, his heirs and successors, of so much of the said land as should be required, or for the damages which they might reasonably claim in consequence of the canal and works being cut and constructed on their lands.

By the 3rd section it was enacted, that such parts or

portions of land or lands covered with water, as might be so ascertained and set out by the officer employed by His Majesty as necessary to be occupied for the purposes of the said canal, and also such parts as might, upon any alteration or deviation from the line originally laid out for the canal, be ascertained and set-out as necessary for the purposes thereof, should be for ever thereafter vested in His Majesty, his heirs, and successors.

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R^B HOLMES.
Statement.

The 4th section enacted, that, if before the completion of the canal through the lands of any person no voluntary agreement should have been made as to the amount of compensation to be paid for damages according to the provisions of this Act, the officer superintending the work should at any time after the completion of such portion of the canal, upon the notice or request in writing of the proprietor, appoint an arbitrator to meet the claimant's arbitrator, and they, with a third arbitrator to be appointed by them, should make their award of the amount of damages to be paid to such claimant.

By other clauses, provisions were made for an assessment by a jury in case of dissatisfaction with such award.

By the 9th section, it was enacted, that, in estimating the claim of any individual to compensation for property taken, or for damage done, under the authority of this Act, the arbitrator or jury assessing such damages should take into their consideration the benefit likely to accrue to such individual from the construction of the canal, by enhancing the value of his property or producing other advantages ; provided always, nevertheless, that it should not be competent to any arbitrators or jury to direct any individual claiming as aforesaid to pay a sum in consideration of such advantages over and above the amount at which the damages of such individual should be estimated.

The officer appointed to execute the powers of the Act

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was Lieutenant-Colonel *John By*; and he set out and ascertained part of the lands granted to *Mrs. M'Queen*, amounting to 110 acres, as necessary for making and completing the canal, and other purposes and conveniences mentioned in the Act.

Adjoining land, belonging to *Nicholas Sparks*, was also set out and taken; and a considerable portion thereof, which was not used for the canal, had since been restored to him, as hereinafter mentioned.

After the passing of the Act, *Mrs. M'Queen* died intestate, leaving her husband, and her eldest son and heir-at-law, *William M'Queen*, her surviving.

By a deed dated January 31, 1832, the husband released all his interest in the said tracts of land to *William M'Queen*.

By a deed dated February 6, 1832, and made between *William M'Queen* of the one part, and the said Colonel *By* of the other part, the tracts of land comprised in the two grants were conveyed to the use of Colonel *By* in fee, by the original description and acreage of the parcels, as contained in the Crown grants, together with the appurtenances, and all the estate, right, title, interest, claim, property, and demand whatsoever, either at law or in equity of the said *William M'Queen*, of, to, or out of the same and every part thereof.

No exception or reservation to the said *William M'Queen* of any part of the said tracts of land, or of any estate or interest therein, was contained in the said conveyance; but, on the contrary, it was intended to pass, and actually did pass to Colonel *By*, all his estate and interest whatsoever.

The *Rideau* Canal was completed and opened for traffic throughout in the month of May, 1832.

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 RE HOLMES.
 Statement.

Colonel *By* died on February 1, 1836, having devised his *Canada* estates to trustees upon certain trusts, under which the said *Canada* estates had now become vested in the suppliants.

On April 20th, 1836, an Act of the Provincial Parliament of *Upper Canada* (6 Will. 4, c. 16) was passed, for the purpose of altering and amending the *Rideau* Canal Act; and thereby it was enacted in effect, that persons claiming compensation for damages done to their lands on the *Rideau* Canal, should not be debarred from receiving such compensation by reason of their having acquired title after the commencement of the works under a purchase made before such commencement, provided such persons were the real owners of the property damaged, and had not acquired the same for the purpose of preferring such claim; and provided also, that when the former owner had compromised or waived his claim, or been satisfied therefor, the assignees should not be entitled to compensation; and that in all cases of a sale of property after the commencement of the works, the compensation should be made either to the former owner, or to the assignee, as might appear just to the arbitrators under the facts proved.

No payment or compensation was ever made to *Grace M'Queen*, *William M'Queen*, or Colonel *By*.

In 1840, the trustees of the will of Colonel *By* petitioned the Government of *Upper Canada* for compensation for the land taken and actually used for the canal; and upon an arbitration it was awarded, that, by reason of the enhanced value of the property, they were entitled to no compensation; and the award was subsequently confirmed by a jury.

On December 9th, 1843, an Act of the Provincial Parlia-

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ment of *Canada* (then united into one province) (7 Vict. c. 11), called "The Ordnance Vesting Act," was passed; and thereby the lands and real property therein mentioned, including the *Rideau* Canal and the lands and works belonging thereto, were vested in the principal officers of Her Majesty's Ordnance in *Great Britain*, subject to the provisions of the Act, and in trust for the service of the said department. The 29th section enacted "that all lands taken from private owners at *Bytown* under the authority of the *Rideau* Canal Act for the uses of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken."

After the passing of this Act, *Nicholas Sparkes*, the proprietor of land adjoining that of the suppliants, part of which had been taken for the canal, applied for restoration of the unused portion; and thereupon an Act of the Provincial Parliament (9 Vict. c. 42) was passed "To explain a certain provision of the Ordnance Vesting Act, and to remove certain difficulties which have occurred in carrying the said provision into effect."

This Act recited the 29th section of the Ordnance Vesting Act, and that doubts had arisen as to the meaning of it, and enacted that the said proviso should be construed to apply to all the land taken from *Nicholas Sparkes*, except the actual site of the canal and certain adjoining land; and that, notwithstanding an Act of the 2nd Vict., to limit the period for claims for damages already occasioned by the construction of the *Rideau* Canal, all the land to which the said proviso was applicable should, if retained by the principal officers of Her Majesty's Ordnance under the provisions of this Act, be paid for by them as in this Act provided; and any parts not so retained should be and the same were thereby declared to be absolutely revested in *Sparkes* or the parties respectively to whom the same might have been conveyed by him before the 10th of May, 1846,

such conveyances not to be invalidated by want of possession in *Sparks*, or by adverse possession by the said principal officers.

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 Statement.

On June 19th, 1856, an Act of the Provincial Parliament (19 & 20 Vict. c. 45) was passed, whereby, after reciting the Ordinance Vesting Act, it was, by the 6th section, enacted that, from and after the passing of the Act, all the lands and other real property comprised in the 2nd schedule to the Act (including the *Rideau* and *Ottawa* Canals, and the blockhouses and adjuncts of the canals), which were vested in the principal officers of Her Majesty's Ordinance, and used or occupied for the service of the department, by whatever mode of conveyance the same should have been so purchased or taken, either in fee or for any life or lives, or any term or terms of years, or any other or lesser interest, and all erections thereon, with the rights, members, easements, and appurtenances to the same belonging, should, by virtue of this Act, be and become and remain and continue absolutely vested in Her Majesty the Queen, "for the benefit, use, and purposes of this province, according to the respective nature and quality of the said lands and other real property," and should be subject to the provisions of the Provincial Act of the 16th Vict. for amending the law of sale and settlement of public lands, and any further provisions which the legislature of this province might, from time to time, enact in respect thereof, and should be held, used, conveyed, and dealt with accordingly, but subject nevertheless to all sales, agreements, lease or leases, agreement or agreements for lease already entered into with or by the principal officers of Ordinance or any person authorised by them to exercise the powers of the Ordinance Vesting Act.

And the said Act contained the following proviso :—

Sect. 7. "Provided always, and be it further enacted, that nothing herein contained shall be taken to affect the rights of any parties claiming any of the lands, buildings,

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 —
 Statement.

or other property referred to in the next preceding section and in the said 2nd schedule; and that all actions now pending against the said principal officers in relation thereto may be proceeded with to final judgment in the name of the said principal officers, and as if the appointment of the said principal officers had not been revoked by Her Majesty; and it shall be lawful for Her Majesty's Attorney-General to appear in any such case on behalf of the Crown, and the Crown, and all other persons whatsoever, shall be bound by the final judgment of the Court in which such suit may have been commenced."

In July, 1856, a memorial was presented by *C. W. By* to the Governor-General of *British North America* in Council, praying for restoration of the unused part of the land taken from *Mrs. M'Queen's* estate.

The suppliants had since become the only persons interested in Colonel *By's* *Canada* estates, and claimed to be entitled to restoration of the 110 acres so taken as afore-said, except the portion used for the purposes of the canal, being not more than twenty acres; but their title was denied on the part of the Provincial Government, who were selling part thereof, and intended to sell the whole, and apply the proceeds to their own purposes.

The petition prayed that so much of the parcels of the said grants of the 20th of May and the 10th of June, 1801, as was formerly taken for the use of the canal, but was not used for that purpose, might be restored and revested in the suppliants, according to their rights and interests in the same.

To this petition the *Attorney-General* demurred.

Argument.
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The *Solicitor-General*, Sir *Hugh Cairns*, Q. C., and Mr. *Wickens*, for the demurrer:—

The petition is wrong in point of form, and ought to have been under the old practice, the case not being within the Act of 1860.

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But apart from any technical objections, there is no jurisdiction in this Court to entertain the question.

The suppliants do not profess to base their right on contract, but they say that a foreign Act of Parliament (for *Canada* is for all judicial purposes a foreign country) directs that in certain events lands in that foreign country "shall be restored to the party or parties from whom the same were taken."

Now, assuming this case to be so far made out as to bring the lands in question within the proviso, and supposing also that the question were between subject and subject, still the remedy would be only by mandamus in the courts of *Canada* to give effect to the provisions of a provincial statute. There can be no relief in such a case in this country, and still less can this Court interpose, because the right, if anything, is a legal right under the Act of Parliament. There has been no conveyance to vest the legal estate in the Crown or previously in the Ordnance officers; and the enactment, that the lands be restored, is not a direction that they shall be reconveyed, nothing being necessary except the surrender of possession. There is nothing in the case at all analogous to those decisions by which this Court, acting in personam against a party to a contract, has decreed the performance of such contract, although it related to land in a colony. Even, therefore, between subject and subject, there would be no jurisdiction; and if the Act of 1860 were applicable, which enables a subject to proceed against the Crown in like manner as against a subject, it follows that there would be no remedy against the Crown.

Further, the petition is framed on the assumption that

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 —
 Argument.

the Crown is a trustee of these lands, for the purpose of restoring them. There is nothing in the Provincial Act to make the Crown in any sense a trustee for the suppliants. It directs that the lands vested in the Crown shall be held for the benefit, use, and purposes of the province of *Canada*; but that merely points out that the Crown takes in capacity of sovereign of *Canada*, and does not constitute a trust such as this Court can deal with. The Crown cannot be a trustee at all; but, if it could, the trust here would be for the province, and not for the owners of the land.

If all these difficulties were got over, the persons entitled to claim the restoration would be the representatives of *William M'Queen*, and not those who claim under Colonel *By*. The conveyance of 1832 passed all the interest which *William M'Queen* had in the land, but it could not pass an interest which was only created by a long subsequent Act of Parliament in favour of "the party or parties from whom the land was taken." The suppliants are not such parties.

[They cited—*Ex parte Pollard* (a), *Penn v. Lord Baltimore* (b), *Clayton v. Attorney-General* (c), *Story on Conflict of Laws* (d).]

Mr. *Giffard*, Q.C., Mr. *W. W. Cooper*, and Mr. *Hanson*, for the suppliants :—

There is no pretence for questioning our derivative title. All the land, including that taken for the canal, was conveyed to Colonel *By*, together with all the interest of *William M'Queen*. This must pass every right which is recognised by a subsequent Act of Parliament as belonging to the owners of the land at the time when it was taken. The proviso of the Act of 1843 cannot be read as a mere

(a) Mont. & Ch. 239, 250.

(b) 1 Ves. sen. 443.

(c) 1 C. P. Cooper, 97.

(d) Sects. 542—545.

gratuitous act of bounty to certain persons, but as a recognition of an equitable right belonging to the owners of the land as such, to have the unused portions restored; and such an equity, thus confirmed by a later Act of Parliament, must enure for the benefit of those on whom the title to the land has devolved.

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Then, as to the question of jurisdiction, I admit that this Court cannot make a decree in rem as to land in *Canada*; but the present proceeding by petition, like a bill to enforce a contract or a trust, or a bill to settle boundaries and get a conveyance, is a proceeding in personam, and within the jurisdiction wherever the subject matter may be locally situated. If the contracting Defendant or the trustee is here, that is sufficient to give the Court jurisdiction. The Crown is here, and under the Act of 1860 the same relief may be had as if the land had been vested in a private trustee, upon trust to restore it (in the events that have happened) to the suppliants.

On the question of jurisdiction, we are within the principle of *Penn v. Lord Baltimore*.

[The VICE-CHANCELLOR referred to Lord *Langdale's* observations in *Bunbury v. Bunbury (a)*, and observed that *Penn v. Lord Baltimore* was a case of contract.]

Mr. *Giffard*.—There is no substantial difference between an Act of Parliament vesting land in the Crown with a proviso for reconveyance, and a contract between two subjects. The Petitions of Right Act, 1860, removed all difficulty by reason of the Crown being the party proceeded against, by enabling the suppliant to proceed as against a subject.

[The VICE-CHANCELLOR.—They say that would be by

(a) 1 Beav. 326.

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mandamus in *Canada*, and further that the Act of 1860 does not apply, but that you ought to have followed the old practice.]

Mr. *Giffard*.—The Act gives us the option of proceeding either under the old or the new practice. If we were asking for execution the remedy might be only in *Canada*, but this Court has jurisdiction to determine our rights as against the Crown. The essence of the case is merely this :—The Crown, whether technically called a trustee or not, is in the position of a trustee, having lands vested in it, which we have an equitable right to have restored. By the Act of 1856, the Crown was made a trustee almost in terms for the purposes of the province, one of these purposes being the restoration of unused land. If it were a subject who held the lands, we should ask in this Court for a conveyance from our trustee. Being the Crown, we ask by petition of right for a grant. The object is to give effect to a trust by a proceeding in personam. The Crown, the trustee, is present, and that gives the Court jurisdiction.

[They cited *Tulloch v. Hartley* (a), *Innes v. Mitchell* (b), *Kildare v. Eustace* (c), *Oranstown v. Johnston* (d).]

The *Solicitor-General*, in reply :—

The words of the Petitions of Right Act, 1860, are quite conclusive against this petition. They enable the suppliant to proceed as against a subject, and in this case there would be no jurisdiction in this Court against a subject to make an order for the restoration of lands in *Canada* pursuant to a Provincial Act of Parliament. A subject could only

(a) 1 Y & C. 114.

(b) 4 Drew. 57; *S. C.*, on appeal, 1 D. G. & J. 423.

(c) 1 Vern. 419.

(d) 3 Ves. 170, 182.

sue for such a purpose in the courts of *Canada*; and though they say they do not ask for execution, they do ask that the land may be restored and revested, for which purpose the thing, and the only thing wanted, is possession, no reconveyance being necessary. There is no ground for supposing the courts of *Canada* defective, and this Court will not assume that to be the case.

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Then they say, the Crown is a trustee. The Crown cannot be a trustee; and if it were, the trust is for the province, not for these claimants. The Act does no more than vest this land in the Crown as part of the public property of *Canada*; and you might as reasonably call the Crown a trustee of all the public property held by hereditary right in this country, which it may be in a certain qualified sense, but not so as to give any claimant against it a right to proceed as a cestui que trust, when in fact the claim is under a title alleged to be paramount to the Crown.

Again, they say their right was equitable as against the Ordnance officers. It was not so; whatever right there was, was legal. There was no conveyance to the Ordnance officers, and no re-conveyance is necessary to revest the land. Where land is restored the law restores it, and *Spark's Act* was a declaration to this effect in that particular case.

Even if some deed or act of restitution were required, clearly the remedy would be by mandamus, and not in a Court of equity: *Adams v. London and Blackwall Railway* (a).

Some analogy was suggested to a suit to settle boundaries; but the Court does not entertain such a suit unless it sees a duty on one side to maintain such boundaries; and here it would be impossible for this Court to determine what land was required for the purposes of the canal. There is a suggestion of an intended sale of the land, but the Court will not act on that alone: *Davenport v. Davenport* (b).

(a) 2 Mc. & G. 118.

(b) 7 Hare, 217.

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Moreover, the suppliants have shown no title, which, if in any one, is in the representatives of *Grace M'Queen*.

It is plain, too, that the Act passed to restore *Spark's* land, excluded any other claimant, and finally closed the question.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question in this case is raised by the demurrer of the Crown to a petition of right of several persons claiming title under Colonel *By* to certain lands in *Canada*. The substantial object of the petition is, to try the question of right between the suppliants and the Crown to certain lands in *Canada*, which were originally taken for the purposes of the *Rideau Canal Act* (a provincial statute), and which, not being wanted for the canal, are required by a subsequent colonial statute to be restored to the proprietors from whom they were taken.

By a third colonial statute it was enacted, that all the lands taken for the canal which had by force of the previous Acts been vested in the principal officers of Ordnance, should by virtue of that Act become and remain vested in the Queen for the benefit, use, and purposes of the province, and should be subject to the provisions of a colonial Act of the 16th of the Queen, relating to the sale of public lands, and to any further provisions which the legislature of the province might enact from time to time, and should be held, used, conveyed, and dealt with accordingly, but subject, nevertheless, to sales, leases, and agreements already entered into by the Ordnance officers. This Act contained a proviso that nothing therein contained should affect the rights of any persons claiming any of the said lands.

It is alleged by the petition that the land in question is part of the lands comprised in the last-mentioned statute.

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The demurrer on the part of the Crown was argued mainly upon the ground that the question raised related to lands out of the jurisdiction of this Court, and that the case was one in which no court in this country would take upon itself to determine the rights of the parties.

The suppliants insist that they are entitled to have their suit entertained by virtue of the 23rd & 24th Vict. c. 34, the Petitions of Right Act, 1860.

The 1st section of that statute enacts, that a petition of right may be intituled in any one of the superior Courts in which the subject matter of such petition would have been cognizable, if the same had been a matter in dispute between subject and subject.

The argument founded upon this enactment was to this effect: Considering that no direct remedy in rem could be given in this Court as to land in *Canada*, it is said that, according to a series of authorities, of which *Penn v. Lord Baltimore* is the leading case, where a question is raised with reference to land in a foreign country, in such a manner as merely to call upon the Court to determine or enforce some right by a decree in personam, the Court has jurisdiction to interfere; and it is suggested, that, upon obtaining a declaration or decree against the Crown in personam here, the suppliants would acquire the right through that decree, to which a foreign Court would give effect. It is asked, accordingly, that this Court should direct a conveyance to be made in accordance with the provisions of the provincial statute.

That appears to be the substantial point in the case; and I think it must be decided adversely to the suppliants.

It was argued, that the Crown was a trustee of this land,

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and was bound to restore it to the owners ; but to sustain the contention, the word 'restore' must be read as signifying something more than the mere surrender of the possession, and implying a grant. If that were so understood, and if the claim were made against a subject or a body of trustees in this country, there might be a decree directing them to execute a conveyance. On this ground it is contended, that the Queen may be regarded as a trustee present in this country, and that a like decree may be made against the Crown.

Now the construction, which, for the purpose of this argument, it is necessary to give to the language of the statute, is certainly a very strange one. The facts are these : The canal was made for a great public purpose. Certain land was taken for this purpose, and when originally taken it was vested in the Crown. Subsequently, another Act vested this land in the Ordnance officers, and directed that the unused land should be restored ; and still later, a third statute was passed, which gave relief to one of the owners, and, according to the contention of the *Solicitor-General*, closed the door upon all other claimants. After this the canal land was vested by another Provincial Act in the Queen for the purposes of the province, and subject to the future legislation of the *Canadian Parliament*.

That being the result of the *Canadian* legislation, a statute has been recently passed in *England*, to which the *Canadian* Parliament was no consenting party, by virtue of which litigation is permitted between a subject and the Crown in any Court competent to entertain the like matters as between subject and subject ; and it is urged, that, by virtue of this Act and of the presence of the Crown, it is open to claimants under the *Canadian* statutes to which I have referred, to sue the Crown in this Court as a trustee present in *England*, and so to draw the jurisdiction over

this purely *Canadian* matter into the Courts of *England*. It would certainly be a great surprise to the legislature of *Canada*, and a very strange doctrine to hold, that the Courts of this country could acquire jurisdiction in the manner suggested to determine rights to land in the colonies in opposition to the provincial legislature.

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RE HOLMES.
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In the observations I have made, I have, in favour of the suppliants, assumed that there is a trust to re-convey to them, that their rights are not merely legal, and that a Court of Equity will execute a trust of the kind with reference to land in a foreign country ; but in order that this may be so, it is requisite that the trustee should be present in this country, and subject to the operation of such decree as the Court may make. Now it is said, that the Queen is present here, and therefore amenable (by virtue of the recent Act) to the jurisdiction of this Court. But it would be at least as correct to say, that, as the holder of *Canadian* land for the public purposes of *Canada*, the Queen should be considered as present in *Canada*, and out of the jurisdiction of this Court. This alone supplies a sufficient answer to the argument of the suppliants ; and without entering into a number of other questions which the case involves, it is enough to say, that when land in *Canada* is vested in the Queen, not by prerogative, but under an Act of the Provincial Legislature, for the purposes of the province, and subject to any future directions which may be given by the Provincial Legislature, I hold, that, for the purpose of any claims to such land made under the provincial statutes, the Queen is not to be regarded as within the jurisdiction of this Court. I wish to rest my decision on the broadest ground, that it was not the object of the Petitions of Right Act 1860, to transfer jurisdiction to this country from any colony in which an Act might be passed vesting lands in the Crown for the benefit of the colony ; and upon that ground I allow the demurrer.

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I do not enter into the questions—whether the proceeding is in proper form; whether mandamus would not be the appropriate remedy; or whether the Queen can be sued as a trustee by a suppliant relying on the late Act, by which Her Majesty has, to a certain extent, divested herself of her prerogative, and placed herself in the position of a subject.

Neither do I discuss the question, whether Colonel *By*, under whom the suppliants claim, took any interest in the lands, the restoration of which is asked, which at the date of his conveyance were not vested in the grantor.

Questions of some nicety would be involved in such a discussion; and I prefer to rest upon the higher ground, that this land cannot be withdrawn from the control of the *Canadian* Legislature, and brought within the jurisdiction of this Court, merely on the technical argument that the Queen, in whom it is vested for *Canadian* purposes, is present in this country.

Minute.

Demurrer allowed, with costs.

1863.
 May 13th, 27th.
*Jurisdiction—
 Delivery of
 Specific Chattel
 —Picture.*

DOWLING v. BETJEMANN.

The Court has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, the legal remedy being inadequate. But where, by the terms of an agreement

THE Plaintiff was an artist, and the Defendants, *H. J.* and *G. S. Betjemann*, carried on business as upholsterers in *Oxford-street*, and had also had dealings in pictures. In the month of May, 1861, the Plaintiff, who had painted a picture of *The Raising of Lazarus*, entered into an agreement with Messrs. *Betjemann*, to the same effect as the agreement of September 17th, 1861, hereinafter stated, except as to the variations mentioned below, and delivered the picture to Messrs. *Betjemann* pursuant thereto.

and the frame of the pleadings, the Plaintiff, an artist, seeking restitution of a picture, had, in effect, put a fixed price upon it—Held that damages would be an adequate remedy, and that there was no jurisdiction in a Court of Equity to interfere.

On September 17th, 1861, a second agreement was executed in substitution for the first, differing from it in having the month of November, 1863, instead of May, 1863, fixed for the payment of the price in the event of a purchase, and also giving two years from the date of the new in lieu of that of the old agreement, for the engraving and exhibition of the picture.

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According to the Plaintiff's allegations, the second agreement was only executed because the original had not been stamped, and the variations in its effect were introduced by Messrs. *Betjemann* without the Plaintiff's knowledge.

The agreement of September 17th was in the following terms :—

"The said *Robert Dowling* hereby agrees to grant to the said *Henry John Betjemann* and *George Stanley Betjemann* the sole right to engrave, or cause to be engraved, for their own advantage and benefit, his the said *Robert Dowling's* picture of '*The Raising of Lazarus*,' and further to give up possession to the said *Henry John* and *George Stanley Betjemann* the said picture, for the space of two years from the date of this agreement, for the purpose of engraving, and also for the purpose of exhibiting for their own advantage and benefit. In consideration of the said grant of copyright and permission to exhibit the said picture, the said *Henry John* and *George Stanley Betjemann* hereby agree to pay the said *Robert Dowling* the sum of £150, on or before the 1st of November, 1862. They the said *Henry John* and *George Stanley Betjemann* further covenant and agree to insure the said picture against damage or injury by fire in the sum of £300, and to keep it so insured during the term of this agreement in the like sum of £300. The said *Robert Dowling* further agrees to sell the said picture itself, and all its rights and privileges connected therewith, to the said *Henry John* and *George Stanley Betjemann*, upon payment of a further sum of £150, on or before the 1st of November, 1863.

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The said *Henry John* and *George Stanley Betjemann* to transfer the policy of insurance of the said picture to the said *Robert Dowling*, so that he may receive the amount thereof if the picture should be injured or damaged by fire, or any that may be due to him the said *Robert Dowling* from the said *Henry John* and *George Stanley Betjemann*, on the said picture '*Lazarus come forth*,' or '*Raising of Lazarus*.' And it is further agreed by and between the said parties to this agreement, that the said picture shall remain the sole property of the said *Robert Dowling* until the full payment of the sum of £300 have been paid him, as before set forth herein. And the said *Henry John* and *George Stanley Betjemann* hereby agree, that, on failure of the performance on their part of any of the covenants of this agreement, the said *Robert Dowling* shall have full right to demand the said picture to be delivered up to the custody of the said *Robert Dowling*; and the said *Henry John* and *George Stanley Betjemann* hereby agree duly to deliver up the same on such demand being made to them in writing by the said *Robert Dowling*."

The bill alleged that the Defendants Messrs. *Betjemann* entered into arrangements for the engraving of the picture, but did not carry them out, in consequence of the sale of the picture, hereinafter mentioned, to the Defendant *Gotto*, "although the Defendants well knew that, and it is the fact, that the agreement that the same should be engraved formed the principal inducement to the Plaintiff to entrust the picture to Messrs. *Betjemann*, and to offer to dispose of the same for the small sum of money mentioned in the agreement."

The Defendants however exhibited the picture, and by a placard and by advertisements announced that it was on view at their premises.

The Defendants did not insure the picture, alleging that they were unable to effect an insurance.

In November, 1861, Messrs. *Betjemann* gave to the Plaintiff a bill of exchange for £50 on account of the sum of £150 payable for the copyright. The bill was dishonoured, but ultimately paid after the sale to *Gotto*. No other payment was made to the Plaintiff.

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On March 8th, 1862, the Defendants *Betjemann* sold the picture for £375 to the Defendant *Gotto*, who stated in his answer that he had no notice or suspicion that the Plaintiff or any other person or persons other than Messrs. *Betjemann* claimed to be owners thereof; and that he believed they were in possession of the picture as the true owners thereof; and he claimed to be protected as a bona fide purchaser for value without notice.

About the same time, but, as appeared, after the agreement for the sale, Messrs. *Betjemann*, without disclosing the sale, proposed to the Plaintiff to take £200 in cash for the picture, in lieu of the £300 payable as provided in the agreement; but this was refused.

In April, the Plaintiff accidentally discovered that the picture had been sold to *Gotto*, and was in his possession; and his solicitors applied without effect both to Messrs. *Betjemann* and Mr. *Gotto* for the delivery up of the picture.

The bill contained a charge "that the said picture is a chattel of a special and peculiar value," and also a submission to perform the said agreement, and to sell the said picture to the Defendants on being paid the balance of £250, and upon the said picture being duly exhibited and engraved, but not otherwise; and also a submission on the delivery to him of the picture to repay the £50 paid by Messrs. *Betjemann* to such of the Defendants as the Court should think fit.

The bill prayed:—

1. That it might be declared that the picture had always

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remained and still continued the sole property of the Plaintiff, subject only to the provisions of the agreement entered into with Messrs. *Betjemann*; and that it might be declared that the Plaintiff had never transferred or parted with the sole legal property, or right of property, in the said picture; and that he was entitled to have the same delivered up to him, and to retain the same and the sole and absolute right of property therein, until the full payment of the said sums of £150 and £150, and until the picture should have been duly exhibited and engraved; or at all events that it might be declared that the Plaintiff had, as against all the Defendants, a right of lien upon the picture for the sum of £250, and to have the picture delivered up as a security for the same.

2. That, if and so far as necessary to the relief prayed, the agreement of the 17th September, 1861, might be specifically performed; and that, if necessary, the Defendants might be decreed to deliver up the picture free of injury, and either pay to the Plaintiff the sum of £250, and duly exhibit the picture and cause the same to be engraved; or otherwise that the agreement might be cancelled, the Plaintiff submitting in such case to repay the sum of £50.

3. That the Defendants might be restrained from parting with the picture except to the Plaintiff, and from suffering the same to be injured or damaged.

4. That the Defendants might be declared liable respectively for any accident, injury, or damage to the picture by fire or otherwise, to be assessed as the Court should direct. And for payment of costs and further relief.

Evidence was given by a number of eminent artists, to the effect that it was customary with artists to dispose of the right to engrave a picture separately from the right to the picture itself, and to deposit pictures with publishers

for the purpose of being engraved and exhibited, without parting with the property in the picture itself.

It also appeared that Messrs. *Betjemann* had styled their shop a Fine Art Repository, and had placed some pictures therein shortly before the sale to *Gotto*; and that they had bought an earlier picture from the Plaintiff in 1860: but it did not appear that they had ever sold any pictures publicly in their shop before the sale to *Gotto*.

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Mr. *Rolt*, Q.C., Mr. *Powell* (of the Common Law Bar), and Mr. *Everitt*, for the Plaintiffs:—

Argument.

As between the Plaintiff and Messrs. *Betjemann* there can be no question that the property in the picture and the right to its possession are in the Plaintiff by virtue of the agreement, the terms of which Messrs. *Betjemann* have fraudulently broken.

With respect to *Gotto's* claim as a purchaser without notice, it is clear that he would have no defence to an action of trover, even if the want of notice were proved: *Dyer v. Pearson* (a), *White v. Garden* (b), *Kingsford v. Merry* (c), *Burroughes v. Baine* (d), *Higsons v. Burton* (e), *Mayall v. Higbey* (f). Neither will the defence of purchaser without notice apply in such a case in equity: *Phillips v. Phillips* (g).

The Defendant *Gotto*, in fact, had sufficient notice by the placards and advertisements, by the nature of the Defendants' business (they not being regular picture-dealers), and by the custom of artists to deposit pictures for engraving and exhibition without parting with the property, to

(a) 3 B & C. 42.

(d) 29 L. J. Ex. 185.

(b) 10 C. B. 919.

(e) 26 L. J. Ex. 342.

(c) 26 L. J. Ex. 83.

(f) 6 L. T. N. S. 362.

(g) 10 W. R. 236.

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put him on inquiry whether the picture which the Defendants purported to sell really belonged to them.

That this Court has jurisdiction to order the delivery up of a chattel of peculiar value, for which damages would be an inadequate remedy, there are abundant authorities of the class of *Fells v. Read* (a), and the *Pusey Horn case* (b).

Mr. Giffard, Q.C., and Mr. Greenside, for the Defendant Gotto:—

The Defendant bought the picture fairly in market overt, and would be entitled to retain it even at law: *Harris v. Shaw* (c).

At any rate his title cannot be disturbed in equity. He is a bona fide purchaser for value without notice, and this defence applies as much to a chattel as to real property: *Wallwyn v. Lee* (d), *Hoare v. Parker* (e), *Joyce v. De Moleyns* (f), *Attorney-General v. Wilkins* (g), *Dawson v. Prince* (h), *Stackhouse v. Countess of Jersey* (i).

The jurisdiction, on the principle of the *Pusey Horn case*, is always founded on the assumption that the damages cannot be ascertained. Here the Plaintiff has fixed the value at £300, and even now offers to take that sum. It is a money demand, and the remedy is at law: *Duke of Somerset v. Cookson* (j), *Lloyd v. Loaring* (k), *Lowther v. Lowther* (l), *Falcke v. Gray* (m).

Mr. T. H. Terrell for the Defendants, Messrs. Betjemann.

(a) 3 Ves. 70.

(b) 1 Vern. 273.

(c) Cas. temp. Hard. 349.

(d) 9 Ves. 24.

(e) 1 B. C. C. 578; S. C.

at law, 2 T. R. 376.

(f) 2 Jo. & Lat. 374.

(g) 17 Beav. 285.

(h) 2 D. G. & Jo. 41.

(i) 1 J. & H. 729

(j) 3 P. Wms. 390.

(k) 6 Ves. 773.

(l) 13 Ves. 95.

(m) 4 Dr. 651.

Mr. *Rolt* in reply :—

There are two questions, which must be kept distinct—first, what is the Plaintiff's right? secondly, what is the jurisdiction of this Court?

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In those cases where it is customary to part with the possession of a chattel, the obligation of inquiring into the true ownership is thrown on a purchaser, who has no right to assume that possession implies property. Still less so here, where there were indications that the possession was only for a limited purpose.

The plea of purchaser without notice must be taken with some qualification, as was held in *Stackhouse v. Countess of Jersey* and *Phillips v. Phillips*.

The Plaintiff, therefore, has the legal right, and also a right to exclude the defence of purchaser without notice; and the only question is, whether the Court has jurisdiction. The remedy by damages could not be adequate. The Plaintiff has a right to the picture, the value of which may be very different from the price named in the agreement, for which the inducement was the understanding, if not perhaps an absolute undertaking, that it was to be engraved. Neither is the Plaintiff barred by offering in the alternative to take the money in lieu of the picture. This is only part of the alternative prayer, and he has a right to stand upon his primary claim to the picture itself.

Wood v. Rowcliffe (a), afterwards affirmed by Lord *Cottenham*, is an important authority on this part of the case. That was sent to law, not for want of jurisdiction, but on account of a doubt as to the legal title, which does not exist here.

(a) 3 Hare, 304.

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Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This case involves some points of considerable interest ; but from the first it has appeared to me, that the great difficulty on the part of the Plaintiff was in making out the jurisdiction of this Court to interpose in a case so circumstanced as the present. That the Court has jurisdiction to order the delivery of a specific chattel of a peculiarly valuable kind, such as a picture, I have never entertained a doubt ; but the observations in *Fells v. Reed* and cases of that class apply only to chattels of which the value cannot be properly ascertained by a jury. They would very pointedly apply to the case of an artist insisting that the value of his picture should not be left to the estimate of a jury. But the difficulty which has weighed on my mind throughout the case is, that the bill is framed, not by any slip, but advisedly and of necessity, on this principle: the Plaintiff has agreed to sell his picture, at a given time and under certain circumstances, for the sum of £300 ; he has granted the right of engraving the picture and of exhibiting it for a fixed time for £150, at the end of which he agrees to part with the picture itself for the payment of the further sum of £150. The prayer of the bill is founded on the idea that there was some positive engagement to engrave and exhibit the picture but, on the contrary, the actual agreement was, that the Defendants, Messrs. *Betjemann*, should pay for the privilege of engraving and exhibiting the picture, without any undertaking on their part to do anything of the kind. It is equally clear that the Plaintiff retained the property in the picture during this interval. I cannot for a moment entertain the argument that the property passed to Messrs. *Betjemann* immediately on the execution of the agreement. The terms of the contract are quite conclusive on that point. The rights of the parties under the agreement are plain. The Plaintiff agrees to sell at a given future

time, and in the meantime to allow the exhibition and engraving of the picture without parting with the property.

Then the bill is framed on this principle: It claims the property subject to the agreement. The first paragraph of the prayer asks a declaration that the picture is the property of the Plaintiff until payment, and until the picture shall have been duly exhibited and engraved (this last condition being founded on a mistaken view of the agreement). Then the prayer goes on to claim a lien for the unpaid purchase-money, and that the agreement may be cancelled unless the same is paid and the picture duly exhibited and engraved. It was, moreover, admitted at the bar that the payment of the £300 would dispose of the whole question in the suit. That is the fair view of the case which is made by the bill. Upon this an insuperable difficulty arises in the way of the jurisdiction which this Court exercises, to order the delivery of a specific chattel of a peculiar value, as in the *Pusey Horn case*. In such a case as this it appears to me that it would be an innovation on the practice of the Court, to say that a jury could not adequately estimate by damages the non-payment of a price fixed, as it is here, by the agreement of the parties.

The bill might possibly have been framed on this footing. It might have said, "You have broken the agreement, and I insist that it shall be cancelled, and that my picture shall be restored." I do not say that that contention might not have prevailed. But upon the bill as it stands the Plaintiff says, he is quite satisfied with the agreed price of £300, and it is only in the event of that not being paid that he asks for the restoration of the picture. That reduces the contest to a mere money demand. The Plaintiff has bound himself to sell for £300. He says the Defendants have attempted to cheat him out of the price, and comes,

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not primarily to have the chattel returned on the ground of its intrinsic value, but to have the contract performed. The same considerations which dispose of the claim to have the picture returned, also displace the right to have a vendor's lien on the picture enforced in this Court.

The Plaintiff may get the value he has himself put upon his picture from the verdict of a jury. No doubt has been suggested as to *Gotto's* solvency, and very strong arguments have been urged to show that *Gotto* would have no defence to an action of trover. According to his own arguments, the Plaintiff will get at law the £300, which is all that he asks by this bill. The difficulty in this Court is, that he does not found his bill on the right to have a specific chattel restored, but on his title to be paid the price of £300, with which he still professes to be content.

It only remains to dispose of the costs. As to Messrs. *Betjemann*, there can be no question. Anything more disgraceful than their conduct can scarcely be conceived. They sold the picture as if it were their own; and knowing that they had made more than £300 out of it, they endeavoured to beat down the Plaintiff, and induce him to accept £200, without informing him of the sale which they had succeeded in effecting. It is clear that they can have no costs.

With respect to *Gotto*, the Plaintiff may either succeed or fail against him at law, and in either view *Gotto* is entitled to his costs in this Court. He ought not in any case to be fixed with the costs of a double litigation. The bill must therefore be dismissed as to Messrs. *Betjemann* without costs; as to *Gotto*, with costs.

I have carefully abstained from saying anything as to the defence of purchaser without notice, which it is unnecessary to discuss, on the view which I have taken of the jurisdiction of the Court.

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3 Dec. 1862

SIMPER v. FOLEY.

Jan. 29th.

THIS was a motion (converted by consent into a motion for a decree) for an injunction restraining the Defendant from darkening certain alleged ancient lights or windows in a public-house at *Fisherton Anger*, in the county of *Wilts*, known as the *Lamb Inn*, in the occupation of the Plaintiff, as tenant from year to year to one *Saunders*.

Easements—Ancient Lights—Light and Air—Prescription Act—2 & 3 Will. 4, c. 71, s. 8—Dominant and Servient Tenements—Union of Ownership—Easement binding on Reversioner—Yearly Tenant—Right of, to an Injunction.

The bill, filed in September, 1861, averred that the Plaintiff had for the last thirty-eight years occupied the *Lamb Inn* as tenant to *Saunders*; that in 1837 *Saunders* purchased six leasehold cottages, together with the gardens in their rear, the easternmost of which gardens was bounded on the east by a portion of the inn, having two rooms (one a tap-room), with windows overlooking the gardens; and that the Plaintiff was entitled to the enjoyment of the lights obtained by these windows "as ancient lights."

The 8th section of the Prescription Act (2 & 3 Will. 4, c. 71), limiting twenty years as the period for acquiring an indefeasible right to the access and use of light, is retrospective, so that such an easement may be acquired by virtue of enjoyment prior to the passing of the Act.

The bill averred that the Defendant had recently purchased the freehold reversion of the leases under which the cottages and gardens were held, and had commenced erecting a wall upon the site of the garden of the easternmost cottage, so as to exclude the light from the Plaintiff's windows.

An union of the ownership of dominant and servient tenements for different estates does not extinguish an easement.

The bill prayed that the Plaintiff might be restrained from continuing or proceeding with the erection of the said

ment of this description, but merely suspends it so long as the union of ownership continues, and upon a severance of the ownership the easement revives.

Where a right to an easement of this description is acquired against the owner of a leasehold interest in the servient tenement, it is acquired also against the owner of the reversion.

A tenant from year to year may file a bill for an injunction to protect an easement of this description, but the injunction will be limited to the period of the continuance of the Plaintiff's tenancy.

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 —
Statement.

wall, or erecting any other building, so as to darken or obstruct the Plaintiff's said ancient lights or windows, or to prevent or impede the free access of light and air to the Plaintiff's premises through the said windows.

The facts in evidence were as follows :—

The *Lamb Inn* was in existence as early as the year 1815. *Saunders* deposed :—" I can recollect the said windows of the said two rooms ever since the year 1815 ; and I say most positively, that, from that time down to the present time, the sole means of access for light and air to the said two rooms have been the said respective windows ; and it is indispensable to the enjoyment by the Plaintiff of the said inn, and particularly to his use of the said tap-room for the purposes of his trade, that the access of light and air to and through the said window of the said tap-room should be free and unimpeded."

By an indenture of lease, dated the 8th of July, 1820, the two easternmost of the six cottages and gardens in the bill mentioned, hereinafter called "the servient tenements," were demised to one *White* for a term of ninety-nine years, if certain persons therein named should so long live.

In the year 1824 *Saunders* purchased the fee-simple of the *Lamb Inn*, and put the Plaintiff in possession of it as tenant from year to year. From that time to the hearing of the cause the *Lamb Inn* continued to be in the occupation of the Plaintiff, as tenant from year to year to *Saunders*.

On the 1st of August, 1832, the Prescription Act was passed (a).

(a) By the 3rd section of this Act (2 & 3 Will. 4, c. 71) it was enacted, "That, when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years,

By divers mesne assignments, and ultimately by an indenture dated the 9th of May, 1837, the servient tenements became vested in *Saunders* for the residue of the term; and thereby the dominant and servient tenements became united in the same ownership.

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By an indenture, dated the 28th of February, 1860, *Saunders* sold and assigned the servient tenements for all his interest therein to one *Dew*.

In April, 1861, *Dew* purchased the reversion in fee-simple immediately expectant upon the determination of the leasehold interest in the servient tenements.

In May, 1861, *Dew* sold and conveyed all his interest in the servient tenements to the Defendant *Foley*, who thereupon proceeded to construct upon the easternmost of the servient tenements the wall of which the Plaintiff complained by his bill.

Mr. *G. Woodford Lawrance* (in the absence of Mr. *Giffard*, Q.C.) for the Plaintiff, now moved for a decree in terms of the notice of motion.

Argument.

By the 3rd section of the Prescription Act, 2 & 3 Will. 4, c. 71, "when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible." Here the Plaintiff shows user and enjoyment of the windows in question ever since the year 1815; consequently, as early as the year 1835, his right became indefeasible.

without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

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 —
Argument.

Mr. *Surrage* (in the absence of Mr. *Rolt*, Q.C.) for the Defendant, contended that the bill must be dismissed.

The Plaintiff has not averred by his bill the case upon which he has relied in argument. According to the case made by his bill, the Plaintiff rests his claim to an injunction upon the ground of user and enjoyment of the lights in question for thirty-eight years immediately preceding the filing of his bill (September, 1861)—a ground which he has failed to establish; for, by his own showing as well as by the evidence in the cause, it appears that from the year 1837 to the year 1860 the alleged servient tenement was in the ownership of his own landlord. According to the case upon which he has relied in argument, he rests his claim to an injunction upon the ground of user and enjoyment for the twenty years from 1815 to 1835, and upon this latter ground it is not open to the Plaintiff, looking to the averments in the bill, to rely.

But if the Court should hold the latter ground to be open to the Plaintiff, it would be insufficient in law. Assuming the alleged easement to have existed prior to the indenture of the 9th of May, 1837, it ceased upon the execution of that indenture. The effect of that indenture was to unite the dominant and servient tenements in the same ownership, and, as a consequence, all easements previously existing were extinguished. Unity of seisin extinguishes an easement: *Whalley v. Thompson*(a). If the dominant and servient tenements are during the prescribed period in the occupation of the same person, no right is acquired: *Harbidge v. Warwick*(b). "It is essential that the dominant and servient tenements should belong to different owners: immediately they become the property of the same person the inferior right of easement is merged in the

(a) 1 Bos. & Pull. 371.

(b) 3 Exch. 552.

higher title of ownership:" *Gale's* "Treatise on the Law of Easements"(a). The enjoyment of an easement as of right for twenty years next before the commencement of the suit within the statute 2 & 3 Will. 4, c. 71, means a continuous enjoyment as of right, for twenty years next before the commencement of the suit, of the easement as an easement, without interruption, acquiesced in for a year. And such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession had its inception after the completion of the twenty years: *Battishill v. Reed*(b). Accordingly, in that case, notwithstanding the Plaintiff had enjoyed a way as of right and without interruption, from 1800 to 1855, when the action was brought, it was held that his claim under the statute was defeated by a unity of possession from 1843 to 1853(c).

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—
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Lastly, even if the Court should be of opinion that the easement revived upon the severance of the ownership by the conveyance of the servient tenement to *Dew*, the right existed against *Dew* only so long as he continued to be merely assignee of the leasehold interest. In April, 1861, *Dew* purchased the reversion, and, upon his purchasing the reversion, his leasehold interest merged, and the easement was gone. The Defendant is in of the reversion. Twenty years user adversely to a tenant for years, or even adversely to a tenant for lives, gives no easement as against the reversioner: *Bright v. Walker*(d). The reversioner cannot be concluded without evidence

(a) Ed. 2, p. 11; ed. 3, p. 14. But see per *Tindal*, C. J., in *James v. Plant*, 4 Ad. & Ell. 761: "We all agree that where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way."
(b) 18 C. B. 696.
(c) *Ibid*.
(d) 1 Cr. Mee. & Ross. 211.

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of his knowledge of the fact of uninterrupted possession for twenty years on the part of the person claiming the easement: *Daniel v. North*(a). The foundation of the alleged right is the assent of the termor; but that is not sufficient. The owner of the inheritance must have concurred. The right claimed is in its nature not one of a temporary kind, but one which permanently affects the rights of property of the servient tenement(b). Consequently, in order that twenty years user may confer an easement, it is necessary to show that the owner of the inheritance of the servient tenement knew that the easement was enjoyed, and was in a situation to interfere with and obstruct its exercise had he been so disposed—for “*contra non valentem agere non currit præscriptio*”(c). The twenty years user is only evidence of a previous grant, and such grant can only have been legally made by a party capable of imposing a permanent burthen upon the property—i. e. the owner of the inheritance(d). And to the same effect Mr. Serjeant *Williams*: “Though an uninterrupted possession for twenty years or upwards should be sufficient evidence to be left to a jury to presume a grant, yet the rule must be taken with this qualification, that the possession was with the acquiescence of him who was seised of an estate of *inheritance*. For if a tenant for term of years or life permits another to enjoy an easement on his estate for twenty years or upwards without interruption, and then the particular estate determines, such user will not affect him who has the inheritance in reversion or remainder; but when it vests in possession, he may dispute the right to the easement, and the length of possession will be no answer to his claim”(e).

(a) 11 East, 372.

(b) Gale, ed. 2, p. 108; ed. 3, p. 162.

(c) Ibid.

(d) Ibid.

(e) 2 Wms. Saund. 175 e.

Mr. Giffard, Q.C., in reply :—

The bill avers that the Plaintiff is entitled to the lights in question as ancient lights; the evidence shows user of them as such from 1815 to 1837; and the Act passed in 1832, fixing twenty years as the period for acquiring a prescriptive title, is clearly retrospective.

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In 1837, therefore, prior to the purchase by *Saunders* of the lease of the servient tenement, the Plaintiff had acquired, under the 3rd section of the Act, an indefeasible right; and although upon that purchase, the ownership of the dominant and servient tenements being united in *Saunders*, the easement may have been suspended, it was not extinguished; for there was no unity of seisin but only of possession: *Thomas v. Thomas* (a). The easement may have been suspended during the union of ownership; but the moment that union ceased, the moment *Saunders* sold to *Dew*, as he did by the deed of the 28th of February, 1860, the easement revived.

As to the argument that the Defendant is in of the reversion, an easement of this nature acquired against the termor is acquired against the reversioner. "If a man opens a light towards the adjoining land, and the landlord or reversioner of such land objects to it, it may be that the latter has no means of redress, or power of preventing the right to light being acquired by twenty years enjoyment, unless he can prevail on his tenant to take steps and block it up, or get an acknowledgment in writing that the right is enjoyed by consent only:" per *Pollock*, C.B., in *Frewen v. Phillips* (b).

(a) 2 Cr. Mee. & Ros. 41.

(b) 7 Jur. N. S. 1247.
30 Luns J. C P 356
11 C A R S 449

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Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It seems to me that the Plaintiff is entitled to an injunction.

It was argued for the Defendant that the Plaintiff has not sufficiently averred by his bill the case upon which he has relied at the hearing—that, according to the case made by his bill, he rests his claim to an injunction upon the fact of his having occupied the public-house in question “for the last thirty-eight years,” that is to say, since the year 1823; but, according to the case upon which he has relied at the hearing, he rests his claim upon the ground of user and enjoyment from 1815 to 1835.

It is true the bill commences with an averment that the Plaintiff has occupied the public-house for the last thirty-eight years. But I find in the bill a separate averment “that he is entitled to the enjoyment of the lights,” obtained by the windows in question, “as ancient lights.” This appears to me to be a sufficient averment of the case upon which the Plaintiff has relied at the hearing.

The bill being launched with this averment, I find in *Saunders’* affidavit the following statement:—“I can recollect the said windows of the said two rooms ever since the year 1815; and I say most positively, that, from that time down to the present time, the sole means of access for light and air to the said two rooms have been the said respective windows; and it is indispensable to the enjoyment by the Plaintiff of the said inn, and particularly to his use of the said tap-room for the purposes of his trade, that the access of light and air to and through the said window of the said tap-room should be free and unimpeded.”

If the Defendant was minded to contradict that statement, he had an opportunity of doing so. As he has not

contradicted it, I must conclude that in the year 1837, when the dominant and servient tenements were united in the ownership of the Plaintiff's landlord, the lights to which the bill refers were already ancient lights, to which, by the 3rd section of the Prescription Act, the Plaintiff's right was to be deemed absolute and indefeasible. The evidence shows that they had been enjoyed for a period of twenty years from 1815 to 1835. The Act passed in 1832 says (a), that, "when the access and use of light to and for any dwelling-house, workshop, or other building, *shall have been* actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible;" and those words are clearly retrospective, so that the right may be acquired by virtue of enjoyment prior to the passing of the Act.

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—
Judgment.

It was next argued, on the part of the Defendant, that, assuming the right in question to have existed in the year 1837, prior to the indenture of the 9th of May, 1837, by which the servient tenements became vested in the Plaintiff's landlord, still, the effect of that deed having been to unite the dominant and servient tenements in the same ownership, all easements existing prior to the deed were finally extinguished immediately upon its execution.

It is true, that by the deed of 1837 the dominant and servient tenements were united in the same ownership, as to the one in fee, as to the other for a term; but by a subsequent deed—the indenture of the 28th of February, 1860—they were again severed, *Saunders* having by that indenture sold and assigned the servient tenement to *Dew*. And I apprehend it is clear that the effect of an union of the ownership of dominant and servient tenements for different estates is not to extinguish an easement of this

(a) Sect. 3.

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FOLEY.

Judgment.

description, but merely to suspend it so long as the union of ownership continues ; and that upon a severance of the ownership the easement revives.

Lastly, it was argued, that, admitting the right to have revived upon the severance of the ownership by the conveyance of the servient tenement to *Dew*, still it existed against *Dew* so long only as he continued to be merely the assignee of the leasehold interest, against which the right was originally acquired ; and that in April, 1861, upon *Dew's* purchasing the reversion in fee expectant upon the determination of the leasehold interest, the term was merged in the reversion, and, consequently, the right to an easement was gone.

But where a right to an easement of this description is acquired against the owner of a leasehold interest in the servient tenement, it is acquired also against all the world, and, therefore, against the owner of the reversion ; consequently, by the merger of the leasehold interest in the reversion of the servient tenement, the rights of the owner of the dominant tenement remain unaltered.

As regards the interest of the Plaintiff in the matters in question in the suit, it is not usual for a bill of this description to be filed by a tenant from year to year ; but I know of nothing to prevent a tenant from year to year from filing such a bill if he be so minded. The injunction must not be perpetual, but limited to the period of the continuance of the Plaintiff's tenancy.

*Minute of
Decree.*

RESTRAIN Defendant, during the continuance of the Plaintiff's tenancy of the *Lamb Inn*, from erecting or continuing any erection or building so as to darken or obstruct the ancient lights or windows in the bill mentioned, or so as to prevent the free access of light and air through the said windows.

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NORTH-EASTERN RAILWAY COMPANY v.
CROSSLAND. 108 of Ld. 350

April 16th &
17th.

*Railway Com-
pany—Minerals
—Right to
Support.*

THIS was a bill to restrain the Defendant from working certain minerals, to the support of which the Plaintiffs claimed to be entitled, in such a manner as to endanger any part of the Plaintiffs' railway or works.

*The Leeds and
Selby Railway
Company pur-
chased land
and the right
of tunneling
under other
land, and took
a conveyance*

The *Leeds and Selby Railway Company* was incorporated by an Act passed on May 29th, 1830 (11 Geo. 4, c. lix.), which contained the following clause:—

thereof "according to the true intent and meaning of their Act." Their Act provided, that conveyances should not pass minerals, and that the owners might work minerals under the railway, doing no damage to the railway. The *York and North Midland Railway Act* contained clauses excluding minerals from their conveyances, and providing that the owners desiring to work minerals under the railway might do so, *doing no wilful damage, and not working in an improper manner*, with a proviso, as to minerals under or within forty yards of the line, that twenty-one days notice of such intention should have been given, and that the Company should not have elected to purchase the minerals. After the before-mentioned conveyance the *Leeds and Selby Railway* was sold to the *York and North Midland Railway Company* under the powers of an Act, which, by sect. 4, repealed the *Leeds and Selby Company's Act*, subject to a proviso that all purchases, sales, conveyances, &c., should remain as effectual as if the said Act had not been repealed, and also contained clauses transferring all the contract-rights and liabilities of the *Leeds and Selby Railway Company* to the *York and North Midland Railway Company*, and a clause (sect. 9) enacting that all the powers, clauses, matters, and things in the *York and North Midland Company's Act* should—*so far as they were not repealed, altered, varied, or otherwise provided for by this Act—extend to the Leeds and Selby Railway and the lands thereof by this Act agreed to be purchased, to all intents and purposes as if the said railway and lands had been by the York and North Midland Act made part of the York and North Midland undertaking, or as if the said powers, clauses, matters, and things had been expressly enacted in reference to the Leeds and Selby Railway and the lands thereof.*

Held—That the original conveyance of the land incorporated the provisions as to minerals of the *Leeds and Selby Act*; that the 4th section of the Purchase Act transferred the land to the *York and North Midland Railway*, with the same mutual rights as to the minerals which had existed between the owners and the *Leeds and Selby Railway Company*, either by force of the provisions of the Act so incorporated or by the operation of the general rules of law; and that the 9th section of the Purchase Act did not bring the minerals under or near the land conveyed within the operation of the clauses of the *York and North Midland Act*, the exception in that section being satisfied by the effect of the 4th section.

The Defendant was the owner of minerals under and near to the lands and tunnel comprised in the conveyance to the *Leeds and Selby Railway Company*, his title being derived under the grantor to the Company subsequently to the conveyance to the Company. He gave notice of his intention to work pursuant to the provisions of the *York and North Midland Act*, and the Company not having elected to purchase, he claimed to be entitled to work—*doing no wilful damage, and not working improperly.*

On a bill by a Company now representing the *York and North Midland Railway Company*, a perpetual injunction was granted, restraining the Defendant from working such minerals, or any minerals to the support of which the Company was entitled, in such manner as to occasion damage to the railway.

1862.
 NORTH-EAST-
 ERN RAILWAY
 COMPANY
 v.
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 —
Statement.

Sect. 30. "Provided always, and be it further enacted, that nothing in this Act contained shall extend to give to the said Company any mines, or any coals, stone, slate, or other minerals under any land purchased by the said Company under the provisions of this Act, except only so much of such coals, stone, slate, or minerals as may be necessary to be dug, or carried away or used for the purposes of this Act; but all such mines, coals, stone, slate, or minerals shall be deemed to be excepted out of the purchase of such land, and may be worked by the respective owners or lessees thereof under the said lands or the railway or other works of the said Company, as if this Act had not passed, so that no damage or obstruction be thereby done or occur to or in such railway or works. Provided, nevertheless, that in case any damage or obstruction shall be so done or occur to or in such railway or works, the same shall be forthwith repaired or removed (as the case may be) by and at the expense of the respective owners or lessees of such mines, coals, stone, slate, or minerals as aforesaid; and if the same shall not be forthwith done, it shall be lawful for the said Company to repair such damage, or to remove such obstruction, and to recover the expenses attending the same, in case of refusal or neglect to pay the same within fourteen days after demand thereof, by distress and sale of the goods and chattels of such respective owners or lessees, or by action of debt or on the case in any of His Majesty's Courts of Record at Westminster."

Additional powers were given to the *Leeds and Selby Railway Company* by an Act of the 5 & 6 Will. 4, c. lvii.

The *Leeds and Selby Railway Company* contracted with one *Henry Hall* for the purchase of certain lands and easements, the price of which was settled by arbitration at

£1,904; and by a deed dated May 30th, 1833, in the form provided by the Act reciting the incorporation of the Company by the said Act, the said *Henry Hall* and his wife granted to the Company a piece of land, and also the right and privilege of working and maintaining a tunnel under other part of the grantors' estate, "to hold the premises to the Company, their successors and assigns for ever, according to the true intent and meaning of the said Act." The Company also purchased from certain charity trustees the privilege of working and maintaining the tunnel under the charity estates; and by a deed dated August 1st, 1835, the said privilege was granted accordingly; and similar privileges under other land were granted by deeds dated August 31st, 1835, and September 29th, 1835. The tunnel was made in pursuance of the said grants and of the powers of the Act.

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 ERN RAILWAY
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 —
Statement.

The *York and North Midland Railway Company* was incorporated by an Act of 6 Will. 4, c. lxxxi., which contained the following clauses :—

Sect. 51. "And be it further enacted, that nothing in this Act contained shall extend to give to the said Company any coal, ironstone, limestone, stone, slate, clay, or other mines or minerals under any land purchased by the said Company under the provisions of this Act, except only so much of such coal, ironstone, limestone, stone, slate, clay, or other mines and minerals as may be necessary to be dug or carried away, or used for the purposes of this Act, or as may be found not deeper than the line of the section hereinbefore mentioned and referred to, unless the said mines shall have been expressly purchased and conveyed by the owner thereof to the said Company; but all such coal, ironstone, limestone, stone, slate, clay, or other mines and minerals not necessary to be so dug, carried away, or used as aforesaid, shall (unless the con-

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trary be expressed) be deemed to be excepted out of the purchase and conveyance of such lands, and may, subject to the restrictions hereinafter contained for the purchase thereof by the said Company, be worked by the respective owners or lessees thereof under the said lands or the railway or other works of the said Company, as if this Act had not been passed: Provided, that, in the working of such mines or minerals, no damage be wilfully done to the said railway or works, and that the said mines and minerals be not worked in an improper manner."

Sect. 52. "Provided always, and be it further enacted, that when and so often as the proprietor or lessee or tenant of any mines of coal, ironstone, limestone, stone, slate, clay, or other mines and minerals lying under the said railway and works, or any of them, or within the distance of forty yards from such railway or works respectively, shall be desirous of working the same, then, and in every such case, such proprietor, lessee, or tenant shall give notice in writing to the said company, under his hand, of such intention at least twenty-one days before he shall begin to work such mines; and, upon the receipt of such notice, it shall be lawful for the said company to inspect such mines, or cause the same to be inspected, and to contract and agree with any such proprietor, lessee, or tenant for the purchase of and to purchase any such mines or minerals, or any part thereof, the getting and working of which may appear to the said company likely to prejudice or damage the said railway or other works; and in case the said company and such proprietor, lessee, or tenant do not agree as to the amount or value of such mines or minerals, the same shall be ascertained and settled by the verdict of a jury, as is hereinbefore directed with respect to the lands which shall or may be taken for the purposes of this Act. Provided nevertheless, that, in case the said company do not before

the expiration of such twenty-one days declare their desire to purchase the said mines, and do not treat with such proprietor, lessee, or tenant for the same, then it shall be lawful for the proprietor, lessee, or tenant of such mines, and he is hereby authorised, to work and get such part of the said minerals as lie under the said railway and works, or within the distance aforesaid, without being liable to the said company for any damage that may be done thereby, unless such damage be wilfully done, or be caused by the working of the said mines in an improper manner."

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Further powers were given to the *York and North Midland Railway Company* by Acts of 1 Vict. c. lxxviii., and 4 Vict. c. vii.

By an Act passed on May 23rd, 1844 (7 Vict. c. xxi.), hereinafter referred to as the Purchase Act, power was given to the *York and North Midland Company* to purchase the *Leeds and Selby Railway*, and the purchase was accordingly effected. The Purchase Act contained the following clauses :—

Sect. 4. "And be it enacted, that, immediately on such payment of the said purchase-money as aforesaid, and upon publication of a notice thereof in the *London Gazette* and in some *York* and *Leeds* newspaper, of which payment the said receipt under the hands of three directors of the said *Leeds and Selby Railway Company* shall be sufficient evidence, the recited Acts of the 11 Geo. 4, c. lix., and the 5 & 6 Will. 4. c. lvii., shall be and are hereby repealed, save and except as to the acts, matters, and things hereinafter to be made or done by the directors of the same company. Provided always, that the repeal of the said recited Acts shall not annul, or in anywise prejudice or affect, any purchase, sale, conveyance, grant, security, act, matter, or

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—
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thing whatsoever theretofore made, done, executed, commenced, or instituted under or by virtue or in pursuance of the said recited Acts so repealed, or either of them ; but that all such purchases, sales, conveyances, grants, securities, acts, matters, and things shall be and remain as good, valid, and effectual to all intents and purposes whatsoever as if the same recited Acts had not been repealed."

Sect. 6. "And be it enacted, that, from and immediately after the payment of the said purchase-money, and such publication of notice thereof as aforesaid, the said *Leeds and Selby Railway*, and all stations, houses, and other buildings, wharfs, weighing machines, and other works belonging thereto, and the ground and soil thereof respectively, and all and every other the lands, tenements, and hereditaments, rights, easements, and appurtenances whatsoever, of or to which the said *Leeds and Selby Railway Company* were by virtue of the said recited Acts of the 11 Geo. 4, c. lix., and the 5 & 6 Will. 4, c. lvii., or either of them, or by any other means whatsoever, seised, possessed, or entitled, at law or in equity, immediately before the payment of the said purchase money, shall belong to and shall, by virtue of this Act, be absolutely vested in the said *York and North Midland Railway Company*, and the undertaking of the *Leeds and Selby Railway* shall thenceforth become and form part of the undertaking of the *York and North Midland Railway*, subject nevertheless and without prejudice to the several mortgages, charges, and incumbrances which at or immediately before the time of such vesting shall have been upon or affecting the said *Leeds and Selby Railway*, or any of the property of the said *Leeds and Selby Railway Company*."

Sect. 7. "And be it enacted, that all contracts, agreements, conveyances, mortgages, bonds, covenants, and securities made or entered into with, to, or in favour of, or by

or for the said *Leeds and Selby Railway Company*, before such payment of the said purchase-money and the publication of such notice thereof as aforesaid, shall, from and after such payment and such publication of notice thereof, be and remain as good, valid, and effectual, in favour of, against, and in reference to the said *York and North Midland Railway Company*, and may be proceeded on and enforced in the same manner by or against the said *York and North Midland Railway Company*, to all intents and purposes, as if the said *York and North Midland Railway Company* had been a party to and executed the same, or had been named or referred to therein instead of the said *Leeds and Selby Railway Company*."

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Sect. 9. "And be it enacted, that, from and after the payment of the said purchase-money and such notice thereof as aforesaid, all and singular the powers and provisions, clauses, matters, and things in the recited Acts of the 6 Will. 4, c. lxxxi., 1 Vict. c. lxviii., and 4 Vict. c. vii., or in any of them contained, shall, so far as they are not repealed, altered, varied, or otherwise provided for by this Act, or by any statute, extend to this Act and to the objects and purposes thereof, and to the said *Leeds and Selby Railway*, and the works, conveniences, lands, tenements, and hereditaments, so agreed to be purchased by the said *York and North Midland Railway Company*, when the same shall have, so as aforesaid, become vested in the last-mentioned Company to all intents and purposes, as if the same railway and works, conveniences, lands, tenements, and hereditaments had in and by the said Acts of the 6 Will. 4, c. lxxxi., 1 Vict. c. lxviii., and 4 Vict. c. vii., been vested in and made part of the undertaking of the said *York and North Midland Railway Company*, and as if the enactments, powers, provisions, clauses, matters, and things, in the same Acts or any or either of them con-

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tained, had been in and by the said last-mentioned Acts expressly enacted in reference to the said *Leeds and Selby Railway*, and the works, conveniences, lands, tenements, and hereditaments of or belonging thereto, or connected or used therewith, and so agreed to be purchased as aforesaid, as well as to the said *York and North Midland Railway*, and also as if the same powers, provisions, clauses, matters, and things were expressly repeated in this present Act with reference to the objects and purposes thereof."

By the *North-Eastern Railway Company's Act*, 1854, the *York and North Midland Company* was dissolved, and its property was vested in the *North Eastern Railway Company*; and all deeds, conveyances, and contracts of the dissolved company were made as effectual for or against the *North Eastern Railway Company* as if executed or entered into by that Company by name.

The Defendant was the proprietor or lessee of certain beds of coal and ironstone, part of which were under and within forty yards on each side of those portions of the railway which were comprised in the before-stated grants. The Defendant derived his title under the said several grantors subsequently to the grants to the Company. On Jan. 21, 1862, the Defendant gave notice to the Company of his intention to work the said beds of coal and ironstone; to which the solicitors of the Company answered, protesting against any working which would affect the stability of the railway, and stating that on *Hall's* sale compensation had been paid for minerals, though that did not appear by the conveyance. The Defendant's solicitors replied, that their notice was given under 6 Will. 4, c. lxxxi., with a view to give the Company the option of purchasing the minerals, and stated that the greater part of the minerals were under the tunnel, at which point the Company had not purchased the land itself.

The Plaintiffs contended that the *Leeds and Selby Company* had acquired a right to the support of the minerals, whether immediately underneath the lands purchased by them and over which easements had been purchased, or so near to the same that the abstraction of the minerals would affect or endanger the stability of the works, and that such right had become vested in the Plaintiffs.

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The Plaintiffs and their predecessors had enjoyed the support of the said minerals for more than twenty years before the notice.

The bill prayed an injunction against working the minerals referred to in the notice, or any other minerals to the support of which the Plaintiffs were entitled, in such manner as to endanger the railway or works.

It was not disputed that the proposed workings would endanger or affect the stability of the railway.

The case came on upon motion for decree.

Sir *H. Cairns*, Q.C., and Mr. *Hobhouse*, for the Plaintiffs ;

Argument.

The *Leeds and Selby* Act reserves all minerals out of grants to the Company, and contains no clause giving the Company a right of purchase of minerals, by the working of which their line might be affected. The only provision is, that minerals under land purchased by the Company may be worked by the owners, "so that no damage or obstruction be thereby done or occur to or in such railway or works."

Under this provision we are entitled to an injunction absolutely restraining all workings by which the stability of the railway will be endangered or affected, it being now settled that the operation of such a clause is not limited to

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unskilful or improper working: *North-Eastern Railway Company v. Elliot* (a).

Mr. *Amphlett*, Q.C., and Mr. *Prendergast*, for the Defendant:—

We admit that the 30th clause of the *Leeds and Selby* Act extends to all injurious workings, whether of an improper kind or not; but we say that this case is governed not by the *Leeds and Selby* Act, but by the *York and North Midland* Act.

The only effect of the 7th section of the Purchase Act is to put the *York and North Midland Company* in the same position as if they had themselves executed the conveyances, deeds, and contracts of the *Leeds and Selby Company*; but the effect of such substituted execution must be determined by the powers and provisions of the *York and North Midland Company's* Act. The 9th section of the Purchase Act makes the *York and North Midland* Act applicable to the *Leeds and Selby* line. Now that Act (6 Will. 4, c. lxxxi.) contains a clause (sect. 52) enabling the owners of minerals to give notice to the Company of their intention to work, and empowering the Company, if they desire to stop the working, to purchase the minerals, and, in default, of their making an offer to do so within twenty-one days, enabling the owner of the minerals to proceed with his workings.

We have given notice under this clause, and the Company have made default for more than twenty-one days, not having offered to purchase.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I cannot come to the conclusion that the rights of the

(a) 1 J. & H. 145.

parties are to be determined on the footing of the *York and North Midland Act* without positively altering the contract entered into by the *Leeds and Selby Railway Company*. It appears to me that one distinct part of the contract between the *Leeds and Selby Railway Company* and the grantors is to be found in the 30th sect. of that Company's Act, and that the reference in the deed to the Act properly embodies these provisions. If this were not so, the contract would be large enough to pass the property in the mines and minerals. The conveyance follows the form given by the *Leeds and Selby Act*, and, but for the provisions of the Act, would have a larger effect than the statute contemplated. This, however, is obviated by the 30th section, which explains what is the meaning of the statutory conveyance; and I think, that, in thus qualifying the conveyance, you must consider the whole of the clause imported, and not merely so much as says that minerals shall not pass. You are referred to the 30th section, to see what the exception from the general words of the conveyance is, and you find, first, that all mines are excepted, and further, that the owners of the mines may work them, so that no damage or obstruction shall be done or occur to the railway or works. The privilege of working mines is reserved to the vendor, although, in form, his conveyance passes everything; and the privilege is coupled with the condition of not working so as to cause damage; and in case of damage arising, then that the mine-owner shall repair it, or, on default, that the Company may do so at his expense.

It is impossible to import into the conveyance part only of the 30th section, so as to reserve the mines to the grantor, without also importing the other part, which says that he must work in such a manner as to cause no damage.

This being so, I have next to consider the operation of the Purchase Act.

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By the 4th clause it is expressly enacted, that, notwithstanding the repeal of the *Leeds and Selby* Acts, all purchases, sales, conveyances, grants, securities, acts, matters, and things made, done, executed, commenced, or instituted, under or by virtue or in pursuance of the said repealed Acts or either of them, shall be and remain as good, valid, and effectual, to all intents and purposes whatsoever, as if the same recited Acts had not been repealed.

The conveyance therefore remains, and has the same effect as if the old Acts had been in no way repealed—that is, the same effect as if the vendor had sold with an express reservation of minerals, coupled with a condition not to work them so as to do damage.

Then, as to the 7th section, I think it cannot be pressed very much on either side. It cannot be read as anything more than an enactment that the *York and North Midland Company* are to have the benefit of and to be bound by all contracts as if they had been their own engagements ab initio; but this must mean as if they had entered into them under such powers as the *Leeds and Selby Company* then possessed. The clause is a mere transfer of rights, and nothing more.

Then comes the 9th section, which is no doubt the most important clause. This enacts that all the powers and provisions, clauses, matters, and things in the *York and North Midland* Acts or any of them contained, shall, so far as they are not repealed, altered, varied, or otherwise provided for by this Act or by any statute, extend to this Act, and to the objects and purposes thereof, and to the *Leeds and Selby Railway*, and the works, lands, tenements, and hereditaments so agreed to be purchased by the *York and North Midland Railway Company*, when the

same shall have become vested in the last-mentioned Company, to all intents and purposes as if the same railway works, lands, tenements, and hereditaments had by the 6 Will. 4, c. lxxxi., the 1 Vict. c. lxviii., and 4 Vict. c. vii., been vested in and made part of the undertaking of the *York and North Midland Railway Company*, and as if the enactments, powers, provisions, clauses, &c., in the said Acts had been expressly enacted in reference to the *Leeds and Selby Railway*, and the works and lands of or belonging thereto or connected therewith, and also as if the same were expressly repeated in this present Act with reference to the objects and purposes thereof.

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This is very strong, but the point of the argument is derived from the construction to be put upon the words "except so far as hereby repealed, altered, varied, or otherwise provided for." I consider that the Act does provide expressly that all contracts shall remain in statu quo. I regard the 30th clause of the *Leeds and Selby* Act as imported into the contract for the land; and I hold that the contract with that clause so imported into it was not meant to be affected by the subsequent Act. This, I think, is expressly provided by the 4th section of the Purchase Act, and, consequently, the case is excepted out of the operation of the 9th section.

Mr. *Amphlett* argued, that his contention would not alter the contract, but simply import into it a reasonable condition from the *York and North Midland* Act; and that whereas by the original Act under which the conveyance was made, the Company had no power of purchasing the mines or restraining the workings until actual damage was done, they would, by adding the further provision of the *York and North Midland* Act, obtain the benefit of preventing the possibility of damage, while the owner of the mines would have the advantage of working as he pleased, unless the

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Company, on receiving notice, should think fit to purchase. The supposed benefit to the Company, however, would merely go to the evidence on which an injunction might be obtained. The legal right would be unaltered, because, under the original Act, the Company would be entitled to full compensation, while the benefit to the landowner would be, that he would get the full value of the minerals, which would be worthless to the Company. It cannot be supposed that the Company would desire to become purchasers of the mines, or to have the contract varied in the manner suggested.

The whole question, therefore, resolves itself into this—whether the Company are entitled to say, “We took the *Leeds and Selby* contracts as we found them, by virtue of the provisions of the 4th section of our Act; and that being so the 9th section does not apply, because the case is otherwise expressly provided for by the Act.” I think they are so entitled. The injustice of a different construction might be very great, because, taking the law as it is now settled, it would be competent for any vendor under the *Leeds and Selby* Act to ask a jury for compensation for the restriction on the working of minerals imposed by that Act; and after that it would be the utmost injustice to vary the effect of the contract, and compel the Company to pay twice over for the same minerals.

I am therefore of opinion that the contract must be construed by reference to the *Leeds and Selby* Act, in other words, the minerals must not be worked so as to cause damage to the railway or works of the Company. There is a positive prohibition of such working; and though a remedy is provided for damage done, the provisions for compensation cannot interfere with the jurisdiction of this Court, and the Company are entitled to an injunction to prevent a threatened injury.

The Company inquired whether there was an intention to work so as to affect the stability of the line ; to which the only answer was, that the notice was given under the *York and North Midland Act*, which (in the absence of an offer to purchase) empowers the mine-owner to work notwithstanding such injury. The Company were offered the option either of buying the minerals or submitting to the damage apprehended. There is, therefore, a case for an injunction to restrain the Defendant from working minerals under the lands, railway, or works of the Company, in such a manner as to occasion damage to the railway or works.

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If it is asked that the injunction should extend to workings beyond the limits of the railway and works and the Company's land, I must hear a reply as to that. The 30th clause of the *Leeds and Selby Act* has no reference to damage caused by the withdrawal of lateral support.

Mr. *Hobhouse*, in reply.—The notice comprises land beyond the railway.

Argument.

Before the passing of the Purchase Act the *Leeds and Selby Company* were entitled both to vertical and lateral support for their railway by the contract embodying the 30th section and by common law right ; and as the Defendant and the Company derive title under a common vendor, there is a further right, on the principle of *The North Eastern Railway v. Elliott*. The contract being transferred to the Plaintiffs, all these rights have passed with it.

VICE-CHANCELLOR SIR W. PAGE WOOD.—I think your view is correct. The 30th section gave a right to vertical support, which was imported into the contract. The law gave a right to lateral support, flowing

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out of the contract. The Purchase Act, in transferring the contract as it stood, carried with it all rights and obligations, whether expressly conferred by it, or flowing out of it by the operation of law. The injunction will therefore extend to lateral as well as vertical support.

Minutes of
 Decree.

DECREE perpetual injunction to restrain Defendant from working any of the minerals referred to in his notice, or any other minerals to the support of which the Plaintiffs are entitled under their contracts, in such a manner as to occasion damage to the railway or works by the abstraction of such minerals.

June 4th.
 Mortgage—
 Power of Sale
 —Sale by
 Second Mort-
 gages—Receipt
 of Purchase-
 money—
 Deposits—Ap-
 propriation of,
 by Solicitor.

A first mort-
 gagee joining
 in a sale by a
 subsequent
 mortgagee,
 executing con-
 veyances, and
 signing receipts
 for the pur-
 chase-money of
 lands in
 mortgage—
 Held, not ac-
 countable,
 either to the
 mortgagor or to
 the subsequent
 mortgagee in
 respect of de-
 posits, which,
 pursuant to the
 conditions of
 sale, the purchasers had paid to the solicitor, and with which the solicitor had absconded.

BARROW v. WHITE.

THIS suit was occasioned by the misconduct of one *Norman*, a solicitor, who had appropriated to his own purposes sums amounting to £969 2s., being the deposits paid into his hands upon the sale of an estate at *Thornbury*, in *Gloucestershire*, called the *Kington House* estate.

In the year 1854 the Plaintiff's father, *Robert Knapp Barrow*, hereinafter called *Barrow* the elder, was seised of the *Kington House* property for an estate in fee simple, subject to various mortgages created by himself, upon separate portions of the property, for sums amounting to £7,050. Each of these mortgages contained the usual powers of sale and of giving receipts for the purchase-money.

On the 14th of September, 1854, two of the mortgages, each being for a sum of £800, were transferred to the

And, *Semble*, under such circumstances it is immaterial whether the solicitor acted in the transaction as agent also for the first mortgagee.

Defendant *White* by two several indentures of that date, and to which *Barrow* the elder was a party. Each of these indentures contained a declaration, that, in case default should be made in payment of the principal or interest, it should be lawful for *White* to sell the hereditaments therein comprised; and that *White* should stand possessed of the moneys arising from the sale, after payment of principal, interest, and costs, upon trust for *Barrow* the elder, his heirs and assigns, as real estate.

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On the 15th of September, 1854, *Barrow* the elder obtained from the Defendant *White* a further loan of £450; and by an indenture of further charge, dated on that day, he mortgaged the whole of the *Kington House* estate to the Defendant *White* in fee, subject to the charges subsisting thereon by virtue of the remainder of the above-mentioned mortgages—all of which *White* afterwards paid off and procured to be transferred to himself in fee. This indenture contained a declaration, that, in case default should be made in payment of the principal moneys and interest thereby secured, it should be lawful for *White* to sell the premises, and that he should stand possessed of the money arising by such sale, after payment of principal, interest, and costs, upon trust for *Barrow* the elder, his executors, administrators, and assigns.

Each of the deeds of the 14th of September, 1854, and the deed of the 15th of September, 1854, contained a covenant by *Barrow* the elder with the Defendant *White* for payment of the principal and interest thereby secured.

On the 16th of September, 1854, *Barrow* the elder procured a further loan of £1,000 from one *Benjamin Osborn*; and by an indenture of that date, in consideration of the sum of £1,000, he granted to *Osborn* and his heirs the

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whole of the premises, subject to the prior incumbrances, upon trust, at his absolute discretion and without any further direction of *Barrow* the elder, to sell the premises as therein mentioned; and it was thereby declared, that *Osborn* should hold the money to arise from such sale after payment of the principal and interest thereby secured, and all costs and expenses, upon trust for *Barrow* the elder, his heirs and assigns.

On the 22nd of September, 1854, and in the month of January following, *Osborn* caused the whole of the property to be sold by auction, in lots, subject to certain conditions of sale, the 4th of which was as follows:—"Each purchaser shall, immediately after the sale, pay into the hands of Mr. *George Lewis Norman*, of *Yatton, Somerset*, the vendor's solicitor, a deposit of £10 per cent. on the amount of his purchase-money, and in part payment thereof."

The bill averred that the Defendant *White* "consented to the sales, upon the terms of the purchase-moneys arising from such sales being applied in or towards payment of the mortgage debts due to him."

Norman attended both the sales, and received the deposits on the lots sold, amounting to £969 2s.

The purchases were completed by the execution to the several purchasers, fifteen in number, of as many indentures of conveyance. Each of these indentures recited such of the mortgage securities of the Defendant *White* as were applicable to the portion of the property therein comprised. In several instances, the indentures recited a contract between the Defendant *White*, acting in exercise of his power of sale, and the purchaser. In other instances they recited a contract by *Barrow* the elder and the purchaser,

"with the consent of" the Defendant *White* and *Benjamin Osborn*. In some of the indentures the conveyance was made by the Defendant *White* in exercise of the power of sale therein referred to; and in others the conveyance was made by *Barrow* the elder, with the consent of the Defendant *White* and of *Benjamin Osborn*.

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In each of the fifteen indentures the witnessing part and the indorsed receipt contained an acknowledgment by the Defendant *White* of the receipt of the purchase-money.

In July, 1855, *Norman* absconded, taking with him the sums received by him for deposits.

The bill was filed by *Robert Knapp Barrow* the younger, the executor and residuary devisee of his late father, *Barrow* the elder, against *White* and the executors of *Benjamin Osborn*, as Defendants. It charged that the Defendant *White* had accepted the deposits paid by the purchasers of the several portions of the *Kington House* estate in part payment of the moneys due to him from *Barrow* the elder; and that *Norman*, at the time of his absconding, held the said deposits for the benefit and at the risk of the Defendant *White*. And the bill prayed for a declaration that the deposits received by *Norman* were held by him on behalf of the Defendant *White*, and that the same ought to be allowed as receipts by that Defendant in account between him and the Plaintiff.

The bill also prayed for the usual accounts against *White* as mortgagee.

The evidence in the cause established, to the satisfaction of the Vice-Chancellor, that *Norman* had acted in receiving the deposits as agent of *Barrow* the elder; but the Court was of opinion that there was no evidence to

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show that *Norman* had also acted in the transaction as the solicitor of the Defendant *White*.

Sir *Hugh Cairns*, Q.C., and Mr. *Edward Fry*, for the Plaintiff:—

The deposits received by *Norman* were held by him on behalf of the Defendant *White*, and ought to be allowed as receipts by the Defendant *White* in account between him and the Plaintiff.

We admit that *Norman* acted in the sale as solicitor for the mortgagor; but we insist that he also acted in the sale as solicitor for the mortgagees. He was, in fact, the agent of all parties. The sales were all, in effect, sales by the Defendant *White*, in exercise of his powers of sale as first mortgagee. In several of the conveyances it is so expressed. In all, the sale and the conveyance are expressed to have been with his consent. He concurred in and adopted the conditions of sale; and the 4th of those conditions expressly provides, that each purchaser shall pay the deposit on the amount of his purchase-money "into the hands of *Norman*, the vendor's solicitor." The deposits are so paid; and when the purchases are completed, *White* signs the deeds of conveyance and the receipts for the purchase-money—including the deposits. *White*, therefore, we submit, must be taken to have accepted the deposits so paid into the hands of *Norman*, in part payment of the moneys due to him from the mortgagor; and the Court will consider that *Norman*, at the time of his absconding, held the deposits for the benefit, and at the risk, of *White*.

The case of *Rowe v. May*(a) decides, that, where a

(a) 18 Beav. 613.

mortgagee concurs in and adopts a contract for the sale of lands in mortgage, and the conditions of sale provide that the purchaser shall pay a deposit to the auctioneer, if the deposit be lost by reason of the insolvency of the auctioneer, the mortgagee stands in the vendor's shoes, and the mortgagee must bear the loss (a).

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The VICE-CHANCELLOR.—The Plaintiff states by his bill that the Defendant *White* consented to the sales “upon the terms of the purchase-money arising from such sales being applied in or towards payment of the mortgage-debts due to him.” Must you not show that those terms have been complied with?

Mr. *Fry*.—We have done so, by showing that the deposits were paid to *Norman* as *White's* agent. The transaction amounted, in equity, to an assignment by *Barrow*, the mortgagor, to *White*, the mortgagee, of the deposits in the hands of *Norman*, as a debt from *Norman* to *White*. Suppose *Norman* had attempted to pay any portion of the deposits to *Barrow*, the mortgagor, would not *White* have been entitled to an injunction to restrain him? To the extent of the deposits *White* must be taken to have accepted *Norman* as his debtor in lieu of *Barrow*—to have substituted him for *Barrow*, and to have taken upon himself the risk of *Norman's* solvency.

[They cited also *Scott v. Porcher* (b), *Tatlock v. Harris* (c), and *Ex parte South* (d)].

(a) In *Rowe v. May* the question arose between the purchaser and the mortgagee; and in reference to that decision Lord *St. Leonards* observes, that nothing was there decided between the

mortgagor and the mortgagee: Sugden's “Vendors and Purchasers” (ed. 18), p. 42, note o.

(b) 3 Mer. 652.

(c) 3 T. R. 180.

(d) 3 Swanst. 393.

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Mr. *Osborne* appeared for the executors of *Benjamin Osborn*, deceased.

Mr. *Rolt*, Q.C., and Mr. *Bristowe*, for the Defendant *White*, were not called upon.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It does not appear to me that I ought to call upon Mr. *Rolt* in this case.

It was argued for the Plaintiff that the transaction amounted to an equitable assignment by *Barrow* the elder to the Defendant *White* of the deposits in the hands of *Norman*, as a debt from *Norman* to the Defendant *White*—an agreement in effect by the Defendant *White* to take upon himself the risk of *Norman's* solvency, or in other words to accept *Norman* as his debtor in substitution for his principal debtor, *Barrow* the elder.

That does not appear to me to have been the true nature of the transaction.

The Defendant *White* advances moneys to *Barrow* the elder, and, to secure the repayment of such moneys, he takes from *Barrow* the elder a mortgage containing a covenant for the repayment of the moneys advanced, from which covenant *Barrow* the elder can only discharge himself by repaying the mortgage debt. *Norman* is the solicitor of *Barrow* the elder; he acts as such throughout, and deals with the Defendant *White* in that character. Whether he also acted in the transaction as the solicitor for the Defendant *White*, I do not think material. I do not find any evidence that he did so act; but I do find abundant evidence that he acted as *Barrow's* solicitor, and, indeed, it

is conceded, that, up to the actual execution of the deeds of conveyance to the several purchasers, *Norman* held the deposits as the agent of *Barrow*.

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As to the nature of the agreement with the Defendant *White* there can be no dispute, for it is expressly averred in the bill that *White* consented to a sale of the estate "upon the terms of the purchase-moneys arising from such sale being applied in or towards payment of the mortgage debts due to him."

Those terms *Barrow* the elder was bound to see performed, before he could lay claim to any portion of the purchase-moneys arising from the sales. Of course, under his covenant, he could not lay claim to any portion of those purchase-moneys until the whole of the mortgage debts due from him to *White* were paid.

The estate is sold by *Barrow* the elder.—Strictly speaking the sale was by *Osborn*, the subsequent mortgagee; but, as between *Barrow* the elder and *White*, *Osborn* and *Barrow* the elder are one, and a sale by *Osborn* is in effect a sale by *Barrow* the elder. *Norman*, as agent for *Barrow* the elder, receives and holds in his hands the deposits paid by the purchasers on the amount of their purchase-money; and the agreement with *White* is clear and definite, that the whole money arising from the sales is to be applied towards payment of the mortgage debts due to him, before he will concur in executing the conveyances to the purchasers.

That, when the parties meet to complete the purchases, the purchasers must be allowed in account, as between themselves and the vendors, the entire amounts paid by the purchasers by way of deposit, can admit of no doubt. This was decided in *Rowe v. May*, and it stands to reason that it should be so. Upon no other footing can the balance be claimed, or the benefit of the sales in any

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 —
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way be insisted upon, either by the mortgagor or by the mortgagee. In a question between the vendors on the one hand and the purchasers on the other, the mortgagee, equally with the mortgagor, must admit that the sums paid by way of deposit in respect of the purchase-money, whatever may have since become of them, were well paid. But when the question arises between the mortgagor and the mortgagee,—whether the mortgagee must also admit, as between himself and the mortgagor, that the sums so paid have been well paid to him, the answer is very different.

The case, as it seems to me, is reduced to this simple form:—A vendor of an estate, which is subject to a mortgage, comes to his mortgagor, and says:—"Will you join in the conveyance if I pay you the purchase-money? Part of the purchase-money is lying at my bankers"—for this purpose the solicitor is the same as a banker—"and the purchaser will pay you the balance." Of course, as against the purchaser, upon payment of the balance by the purchaser, the mortgagee must admit the whole purchase-money, including the deposit, to have been well paid, for the purchaser has paid all that he had contracted to pay. But as against his mortgagor, the mortgagee need make no such admission. The mortgagor having told him "my agent has the deposit in his hands," the mortgagee gets all he can from the purchaser, and, of course, he expects to get from the agent or from the mortgagor the amount of the deposit.

Such a transaction differs totally from an equitable assignment—a substitution, as it were, of the solicitor as the agent of the mortgagee, instead of his being the agent of the mortgagor. It is true, it would entitle the mortgagee to file his bill for an injunction against his mortgagor, to arrest the money in the hands of the agent, and prevent

his paying it to the mortgagor ; and upon the strength of the agreement in the case before me, *White*, upon filing such a bill, might have contended, " You, the mortgagor, agreed that I was to be paid out of the purchase-moneys arising from the sales of the estate the whole of the mortgage debts due to me. Part of those purchase-moneys is now in the hands of your agent. You are bound to perform your agreement, and I am entitled to arrest that part of the purchase-moneys in the hands of your agent, and prevent him from paying it to you." But that contest might arise without any sort of arrangement having been entered into (for that is what the Plaintiff has to establish) by which *White* agreed to convert *Norman* into his agent, instead of his being, as he originally was, the agent of the mortgagor.

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Judgment.

Had there been evidence to show undue laches on the part of the mortgagee, the result might have been different ; but, so far as I have evidence on the subject, it seems to have been almost simultaneously with the completion of the sales that the agent absconded. Whether this were so or not, it is enough for me to say, that there is no evidence of any period intervening, in which *Barrow* the elder was deceived into the supposition that all had been settled between his agent and *White* the mortgagee. He is not misled by any recital in any of the deeds, or by any receipt indorsed upon them by the mortgagee. From first to last he is as fully aware of what was being done as *White* himself.

The transaction seems to me to be reduced to the simple case of a person having an interest in the proceeds of an estate contracted to be sold, who, upon the faith that he is to be paid his share of the purchase-money, does what every one knows is constantly done for the convenience of the vendor, namely, signs the receipt for the purchase-money and joins in the conveyance to release his interest. If it

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turns out, when you get at the true state of the facts, that he has not received his share of the purchase-money, it follows, of course, that he is entitled to assert his claim against the person who is his original debtor.

I find nothing in this case amounting to an agreement on the part of *White* to accept *Norman* in the place of *Barrow*, who was his original debtor—to a release (for that is what it must come to) of *Barrow* from the debt which he was under a covenant to pay. I find nothing from which such an agreement can be inferred. Consequently, as the Plaintiff does not desire to proceed with the suit for the mere purpose of obtaining the ordinary decree for an account, I can do nothing but dismiss the bill with costs.

Minute of
 Decree.

THE Court being of opinion that the deposits received by *Norman* were not held by him on behalf of the Defendant *White*, and that the same ought not to be allowed as receipts by the said Defendant in account between him and the Plaintiff, and the Plaintiff thereupon not asking for an account, dismiss the bill with costs.

May 2nd.

FLOWER v. BRIGHT.

Consolidated
 General Orders
 —Order xxxvii.
 Rule 12—Com-
 putation of Time—Close Days—Order v., Rule 6—Holiday under, in Term time—11 Geo. 4 &
 1 Will. 4, c. 86, s. 15, Rule 5—Process of Contempt—Habeas Corpus—Prisoner—Order to
 turn over—Keeper of the Queen's Prison.

IN this case the Defendant was in custody under process of contempt, for not putting in his answer to the bill. He had

When the time for doing an act or taking a proceeding is expressly fixed by Act of Parliament, the 12th Rule of Order xxxvii. of the Consolidated General Orders (providing for cases where the time for doing an act or taking a proceeding expires on a day on which the offices are closed), does not enable such act or proceeding to be done or taken after the expiration of the time so fixed.

Accordingly, where the thirty days limited by the Act 11 Geo. 4 & 1 Will. 4, c. 86, s. 15, rule 5, as the period within which a Defendant in custody under process of contempt ought to have been brought by habeas corpus to the bar of the Court, expired on a day in term time, but on which the Courts were closed by special order of the Lord Chancellor:—*Held*, that the above-mentioned rule did not enable the Plaintiff to bring the Defendant to the bar of the Court on the day on which the offices next opened.

And upon motion on such last-mentioned day that the Defendant might be turned over to the custody of the keeper of the Queen's prison, the Court refused to make any order.

not been hitherto brought to the bar of the Court to answer his contempt, and the contempt had not been cleared.

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Statement.

The thirty days limited by the Act 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, rule 5, as the period within which, under such circumstances, a Defendant is to be brought by habeas corpus to the bar of the Court(a), expired on the 1st of May, 1862, upon which day the several offices of the Court were closed(b) by special order of the Lord Chancellor, made under Rule 6 of Order v. of the Consolidated General Orders.

On the following day (the 2nd of May) the Defendant was brought by habeas corpus to the bar of the Court to answer his contempt.

(a) By the 5th rule of the 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, it is enacted, "That, if the Defendant, under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar of the Court under process to answer his contempt, the Plaintiff, if the contempt be not sooner cleared, shall bring the Defendant by an habeas corpus to the bar of the Court within thirty days from the time of his being actually in custody, or detained (being already in custody) upon process of contempt; and if the last day of such thirty days shall happen out of term, then within the four first days of the ensuing term; and where the Defendant is in custody of the serjeant-at-arms, or of the messenger, upon an

attachment or other process, the Plaintiff shall, within ten days after his being taken into such custody, or, if the last of such ten days shall happen out of term, then within the first four days of the next ensuing term, cause the Defendant to be brought to the bar of the Court; and in case any such Defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff, gaoler or keeper, serjeant-at-arms, or messenger, in whose custody he shall be, shall thereupon discharge him out of custody without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued."

(b) For the opening of the International Exhibition.

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Argument.

Mr. *E. L. Pemberton*, for the Plaintiff, now moved for the usual order, that the Defendant might be turned over to the custody of the Keeper of the Queen's Prison.

This motion, although under ordinary circumstances it should have been made yesterday, is in time to-day. The 12th rule of Order xxxvii. of the Consolidated General Orders provides, that, "where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next open." Here the time fixed by the Act of Parliament for bringing the Defendant to the bar of the Court expired yesterday. The offices were closed yesterday; and the Plaintiff having brought the Defendant to the bar to-day, that proceeding on his part must be held to have been duly taken. The Court, therefore, will make the order moved for.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The Act expressly provides, that, where, as here, a Defendant under process of contempt for not answering shall be in actual custody, and shall not have been sooner brought to the bar of the Court under process to answer his contempt, the Plaintiff, if the contempt be not sooner cleared, "shall bring the Defendant by an habeas corpus to the bar of the Court within thirty days from the time of his being actually in custody, or detained (being already in custody) upon process of contempt."

The Act then makes express provision for the case of

the last of the thirty days happening out of term. It says, "and if the last day of such thirty days shall happen out of term, then within the four first days of the ensuing term."

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The Act then provides for the case of a Defendant being in custody of the serjeant-at-arms or of the messenger upon an attachment or other process, and proceeds as follows:—"And in case any such Defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff, gaoler or keeper, serjeant-at-arms, or messenger in whose custody he shall be, shall thereupon discharge him out of custody without payment by him of the costs of contempt."

The Act provides for a case where the last of the thirty days happens out of term time, but it makes no provision for a case like the present, where the last of the thirty days happens in term time, but on a day on which the offices are closed. For that event the Legislature has not made any provision.

It was argued, that the case is met by the 12th Rule of Order xxxvii. of the Consolidated General Orders, which provides, that when the time for doing any act or taking any proceeding expires on a day on which the offices are closed, such act or proceeding shall be held to be duly done or taken, if done or taken on the day on which the offices shall next open.

But here the time for doing the act in question has been fixed by Act of Parliament. The provision of the Act of Parliament, that it shall be done within the time so fixed, is express. No exception is made by the Legislature for the case which has occurred. A General Order of the Court of Chancery cannot vary the express provision of an Act of Parliament. And I apprehend, that, where the time for doing an act or taking a proceeding is expressly fixed

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by Act of Parliament, no General Order of this Court can enable the act or proceeding to be done or taken after the expiration of the time so fixed by Act of Parliament.

The Defendant has not been brought to the bar of the Court within the time fixed by the Act; and it appears to me that the 12th Rule of Order xxxvii. of the Consolidated General Orders does not enable the Plaintiff to bring him to the bar of the Court to-day.

I can make no order on the motion; and the gaoler must take such course as he shall think fit.

No order was made upon the motion; and no attempt being made to detain the prisoner, he departed out of custody.

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July 12th.

*Will—Codicil
—Erroneous
Recital—Ad-
ditional Gift,
subject to Con-
ditions of
Original Gift.*

A testator gave by will £3,000, upon trust for A. and her children, and after the decease of A. without issue,

for the children of B. By a codicil of later date the testator recited that he had by his will given the £3,000 to A. for life, with remainder to her children, and afterwards to B. for life, with remainder to his children, and revoked the will as to £2,000, part of the £3,000, from and after the devise to A. and her children, and, instead of giving the said sum of £2,000 to B. and his children, bequeathed the same to C:—*Held*, that the erroneous recital in the codicil that the £3,000 was given to B. for life, did not amount to a gift of a life estate in the £1,000 which remained unrevoked.

By the will the testator had also given £2,000 to B. for life, with a gift over on insolvency:—*Held*, that, if the codicil had been read as an implied gift of £1,000 to B. for life, the gift over on insolvency would have attached to the £1,000 as well as to the £2,000.

RE SMITH.

WILLIAM SMITH, by his will dated December 8th, 1837, gave all his real and personal estate to his son *John*, charged, among other things, with the payment of the two sums of £3,000 and £2,000, thereafter bequeathed, with interest from testator's decease. Then followed a bequest of £3,000 to trustees, upon trust for testator's daughter, *Maria*, for life, for her separate use, and after her decease "to divide and pay the said sum of £3,000 unto and

equally amongst the children of *Maria*, in equal shares if more than one, and if but one, then upon trust for that one, the shares of such one or more of them as should be a son or sons to vest in him and them respectively at his or their age or respective ages of twenty-one years; and to vest in such one or more of them as should be a daughter or daughters at her or their age or respective ages of twenty-one years, or day or respective days of marriage, which should first happen. And in default of children of *Maria*, or, being such, if they, he, or she should die without taking a vested interest, then "upon trust to pay the said sum of £3,000 unto and equally amongst the children of his (testator's) son *Edward*, share and share alike, as tenants in common, and not as joint tenants, with benefit of survivorship among them in case any of them should be under age, in the same manner as was thereafter directed as to the sum of £2,000. And the testator gave to the said trustees £2,000, upon trust to pay the income to his said son *Edward* "during his natural life, and until he should become bankrupt, insolvent, or compound with his creditors, and upon and immediately after the decease of *Edward*, or in case he should become bankrupt, insolvent, or compound with his creditors, upon trust "to pay and apply the said sum of £2,000, or the stocks, funds, and securities in or upon which the same should be invested, unto and equally amongst the children of *Edward*, as tenants in common, and not as joint tenants; but if only one such child, then to such only child: Provided always, that in case either of the children of *Edward*, being a son, should die under the age of twenty-one years, or, being a daughter, should die under that age or day of marriage, that then the share of him or her so dying of and in the said trust moneys, as well original as accruing under this present provision, should go unto and be divided equally amongst the surviving children of his said son, as tenants

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 —
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in common, and not as joint tenants; or if but one such surviving child, then to such one." Then followed clauses for maintenance and advancement during the minorities of the children of *Maria* and *Edward* out of their expectant shares, the surplus income of the expectant shares of such children or child to be accumulated for their, his, or her benefit.

The testator made a codicil, dated March 6th, 1838, as follows :—

"Whereas in and by my last will and testament I have given the sum of £3,000 to my daughter *Maria*, for her life, with remainder to her children, and afterwards to my son *Edward*, for his life, with remainder to his children : Now, I do hereby revoke my will so far as relates to the sum of £2,000, part of the said sum of £3,000, from and after the devise to my daughter *Maria* and her children, and instead of giving the said sum of £2,000 to my son *Edward* and his children, I give and bequeath the said sum of £2,000, after the decease of my daughter *Maria* without issue, to my son *John*, his executors and administrators ; and I hereby confirm my will in every respect not altered by this my will."

The testator died on March 17th, 1838.

The petition stated that the testator's son *Edward* had by his first marriage five children : *William*, born in 1827 ; *George*, born in 1829 ; *Selina*, now the wife of *Thomas Hill*, born in 1832 ; *Hannah* and *Henry*, born in 1831 and 1835, both of whom died under age in 1835 and 1839 respectively.

The petition also stated, that, by a second marriage in 1846, *Edward Smith* had had two children, *Maria* and *Edward*, now of the respective ages of fourteen and eleven, and he and his second wife were still living.

In 1841, *Edward Smith* took the benefit of the Insolvent Act.

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Maria Smith married a Mr. *Morgan*, and died on Jan. 11th, 1853, without having had issue.

The trustees paid into Court sums representing the bequest of £2,000 by the will, and also £1,000, part of the bequest of £3,000, questions having been raised as to the right of the children of the second marriage to participate, and also whether *Edward Smith* took a life interest in the £1,000 and £2,000 respectively.

The petition was presented by two of the children of *Edward Smith*, born before the insolvency, and by incumbancers on their shares, and prayed that both funds might be divided into three shares, and paid to *William, George, and Selina*, or their assigns, respectively.

Mr. *Hardy* and Mr. *Roberts* for the petitioners :—

Argument.

It will be contended by the assignee of *Edward Smith* that the erroneous recital in the codicil, that the £3,000 was given to *Edward Smith* for life, amounted to a bequest of the £1,000, which was not revoked by the codicil. But this cannot be, because the erroneous recital is not in the same instrument as the original gift, and cannot deprive the children of *Edward* of an express gift to them : *Adams v. Adams* (a). Even if this were otherwise, the claim of the assignee as to the £1,000 would fail, together with that as to the £2,000, by the gift over on the insolvency, which, on the principle of *Johnstone v. Harrowby* (b), must attach to the additional bounty, supposing any to be bestowed by the codicil.

Mr. *Osborne* for the assignee of *Edward Smith* :—

(a) 1 Hare, 537.

(b) 1 D. F. & J. 183.

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Argument.

1. *Edward* took a life interest in the £1,000, part of the £3,000. It is true, the will gave the £3,000 to his children without any intermediate life estate to the insolvent; but the recital in the codicil, that the bequest was to *Edward* for life, indicates an intention to give a life interest to him, and is equivalent to a bequest, which remains operative as to the £1,000, which the codicil does not revoke: *Jordan v. Fortescue* (a); 1 *Jarman on Wills* (b).

2. The clause as to insolvency, attached to the £2,000 legacy in the will, does not attach to the £1,000 given by the codicil, that being given not as an addition to the former gift, but subject to other prior limitations, and as an independent legacy.

Mr. *Phear*, for the children of the second marriage, submitted that the children of the second marriage were entitled to share in both funds, and cited *Brandon v. Aston* (c) as an authority to that effect.

Mr. *C. Hall*, for the trustees.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I am of opinion that the codicil does not amount to an implied gift of the £1,000 to *Edward Smith* for life. All cases of this description turn upon the intention of the testator, and the distinction drawn by Vice-Chancellor *Wigram* (d) seems to me very intelligible—viz. that where you find a recital that a particular person is entitled under another instrument, that does not in general amount to a gift by the instrument which contains the recital, because

(a) 10 Beav. 259.

(b) 2nd ed. 441—443.

(c) 2 Y. & C. 30.

(d) 1 Hare, 540.

the testator, supposing the interest already to exist, cannot intend by that instrument to create it; but where a testator says in any testamentary instrument that he has by that very document made a particular gift, there the Court will lay hold of this as conclusive evidence of an intention to confer such bounty, and will give to the erroneous recital the effect of an actual gift.

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Judgment.

This principle, however, is not of necessity applied under all circumstances. An example to the contrary, *Skerratt v. Oakley (a)*, is mentioned in Mr. *Jarman's* work. There a testator, having by his will given to his wife certain legacies, and a life estate in leaseholds at *Northwood*, and having bequeathed an estate at *Wrentnall*, and the *Northwood* estate after the wife's death, and all his residue to other persons, made a codicil on the same day, whereby he directed that the bequest to his wife contained in the will should be in full of all her claims on his estate, except the estate for life of his wife and her assigns in the premises at *Wrentnall*, anything in the foregoing will to the contrary notwithstanding. The contest was, that this amounted to an implied gift to the wife of a life estate in the *Wrentnall* property; but the Court decided against the claim, Lord *Kenyon* saying that the intention must be collected from the will and codicil taken together. It is for this last observation that I refer to the case.

The principle which must govern this case may be thus stated: Where there is by a will a clear gift, as here, to a class of children, they cannot be deprived of the benefit, unless the gift is actually revoked. Then is there anything in the codicil which clearly indicates an intention to revoke this gift to the children? It is impossible to hold that there is. The object of the codicil is, to make a gift to

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 Judgment.

John; and, for this purpose, the testator revokes a previous bequest of £3,000, made by the will, to the extent of £2,000. In the case of *Jordan v. Fortescue*, the codicil gave to *William Jordan* £500 "in addition to £1,500, which I have before bequeathed him." It was clear, therefore, that he intended to raise the whole legacy to £2,000, though he made a mistake in reciting the amount of the previous gift. But in this case I am asked to deprive a class of legatees of a clear specific gift by force of an erroneous recital in a subsequent instrument. The codicil does not purport to give anything additional to the objects of the original gift, but to take away part of what the testator supposed himself to have given. It would be a perversion of the principle, that an erroneous recital of a gift by the same instrument may be equivalent to an actual gift, to apply it so as to take away an express bequest by an earlier instrument to some one else, and this where the codicil is not intended to confer any bounty upon the real or supposed objects of the original gift.

Further, I am of opinion, that, after the decision in *Johnstone v. Harrowby*, the second contention of the petitioners must also prevail. I can find no substantial distinction between that case and the present; and therefore, either way, *Edward Smith* would take no interest in the £1,000: first, because the codicil does not amount to a gift; and secondly, because, if it did, the condition in the will would attach, and, in the events that have happened, would defeat the gift.

The remaining question is as to the time when the class is to be ascertained; and as to this I should have felt no hesitation, but for the case of *Brandon v. Aston*. I must hear you, Mr. *Hardy*, upon that point. Is there supposed to be anything special in a gift over on bankruptcy rather

than on death, with reference to the time of ascertaining the class?

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Judgment.

Argument.

Mr. *Hardy*, in reply, argued that *Brandon v. Aston* turned upon special circumstances, and cited *Gillman v. Daunt (a)*.

VICE-CHANCELLOR SIR W. PAGE WOOD.—I think I must follow the general rule. *Brandon v. Aston* seems to have turned on special circumstances. As long as a fund is in hand, the general rule is, that new members of the class may be let in. The time when the money is distributable is the time for ascertaining the class, after which no more can be let in. Children born after the fund becomes divisible are not entitled to share.

Judgment.

DECLARE that *Edward Smith* took no interest in the £1,000, part of the £3,000, and that his life estate in the other legacy of £2,000 ceased upon his insolvency in 1841.

Minutes of
Decree.

As to the £1,000, declare that the same is divisible among such of the children of *Edward*, born in the lifetime of *Maria Morgan*, as may attain or have attained twenty-one, as to sons; or attain or have attained that age, or be or have been married, as to daughters.

As to the £2,000, declare that the same was divisible among such of the children of *Edward*, born before the eldest son attained twenty-one, as may attain or have attained twenty-one, as to sons; or attain or have attained that age, or be or have been married, as to daughters.

Tax and pay costs.

Inquiry as to the children of *Edward Smith*.

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June 12th.

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HOOPER v. GUMM.

Production—
Privilege—
Plaintiff abroad
—Agent—
Books in use
abroad—Form
of Affidavit.

Confidential letters, which, after the matters in the suit arose, and with reference thereto, were sent by a Plaintiff resident abroad to his agents in England, to be communicated to his solicitor:—*Held*, to be privileged.

In order to establish privilege as to letters sent by the agent to the Plaintiff:—*Seem*, that they must appear to have been sent in consequence of communications from the solicitor.

The same practice applies as to the production of books, whether abroad or in England.

It is not sufficient, in order to avoid production in London, to state that books are in constant use, without stating that they cannot be removed without inconvenience.

THIS was an adjourned summons as to the production of documents.

The suit was instituted to establish a claim on the part of the Plaintiff, a merchant in *Boston, U.S.*, to a first charge on an *American* ship by virtue of an alleged mortgage executed in *America*, and to restrain the sailing of the ship. The ship was claimed by the Defendant *Gumm* as a purchaser without notice of the mortgage.

The Plaintiff made an affidavit, stating that he had in his possession the documents in the first and second parts of the first schedule to the affidavit; that he objected to produce “the ledger, journal, cash-book, and bill-book,” in the first part of the schedule, on the grounds that the books were in constant use in his business, that they contained entries not relating to the matters in question in the suit, which the Plaintiff claimed to seal up; and “that he had in the first part of the schedule set forth extracts from entries in such books in any manner relating to the matters in question in the suit.”

The affidavit further stated, that the Plaintiff objected to produce the documents set forth in the second part of the first schedule, on the grounds following:—

“That the documents consist principally—first, of cases or copy cases for and the opinion and copy opinion of counsel thereon, and the drafts of one or some of such cases; also instructions for counsel’s opinion. Secondly, of confidential communications, which, after the matters in question in this suit arose, and with reference thereto, passed between me and Messrs. *G. Peabody & Co.*, of *London*, my attorneys and agents, duly authorised by power of attorney, to

be communicated to my solicitors in this cause, and between such solicitors and the said Messrs. *G. Peabody & Co.* to be communicated to me. Thirdly, the papers and documents in this suit and correspondence relating thereto since the institution thereof. The first part of the schedule contained the following particulars:—

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Statement.

“Ledger, journal, cash-book, bill-book, containing entries of, or relating in any manner to, the matters in question in this suit. The following are extracts from such books, containing all the entries therein relating in any manner to the matters in question in this suit:” [Then followed a number of extracts from each of the several books.]

The second part of the schedule contained a list of letters, some described as from *G. Peabody & Co.* to the Plaintiff, others as from the Plaintiff to *G. Peabody & Co.*, others as from Messrs. *Freshfield & Newman* (the Plaintiff’s solicitors), to *G. Peabody & Co.* It also specified various cases and opinions, and also “the papers belonging to the suit and correspondence since the institution thereof;” also “Extract from the statutes of the *United States*, and brief copy correspondence to accompany” a specified case for counsel’s opinion.

The Defendant took out a summons for the production of the ledger, journal, cash-book, and bill-book, and of the correspondence mentioned in the second part of the schedule; and also that the papers and correspondence mentioned in the second part of the schedule might be set out in a full and complete list upon affidavit.

The summons was adjourned into Court.

Mr. *Giffard*, Q.C., and Mr. *Dickinson*, for the Defendant:—

Argument.

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Argument.

With respect to the books, there is no sufficient statement as to the necessity of having them for daily use. If there were, that would only affect the mode and place of production, but would not entitle the Plaintiff to give extracts in lieu of the books themselves.

Then, as to the correspondence, there is no sufficient claim of privilege. The letters between the Plaintiff and his commercial agents must be produced. It is not stated that the Plaintiff's letters were written *for the purpose* of being communicated to his solicitors; and it is quite consistent with the affidavit that the communication was a subsequent arrangement. Further, there is no ground of privilege at all set up as to the letters from Messrs. Peabody to the Plaintiff. To make communications privileged, they must be for the purpose of defence, or of obtaining legal advice: *Lafone v. Falkland Islands Company* (a), *Goodall v. Little* (b).

We are, moreover, entitled to a fuller statement of the correspondence referred to in the second part of the schedule. It may or may not turn out to be privileged.

Mr. Rolt, Q.C., and Mr. Karlake, for the Plaintiff:—

This is a suit by an *American* merchant, carrying on business in *Boston*. Of necessity, when he found it requisite to instruct a solicitor in *England*, he wrote to his *London* agents to select a solicitor, and sent them the information to be communicated to the firm whom they might select. Such communications are necessary for the conduct of a suit, and come within the rule of privilege, as acted on in *Steele v. Stewart* (c) and *Reid v. L'Anglois* (d).

(a) 4 K. & J. 34.

(b) 1 Sim. N. S. 155.

(c) 1 Ph. 471.

(d) 1 Mc. & G. 627.

In the former case, letters from the solicitor's agent to the party were held privileged; and this is the converse case. In *Reid v. L'Anglois*, the privilege claimed was identical with that which we claim here. *Goodall v. Little* was different, the communications there being between Defendant and co-Defendant, and the principle being that the co-Defendant could be compelled to disclose the facts communicated; and it would, therefore, be contradictory to hold that the statement of them was privileged in the hands of the Defendant, to whom it had come. As to the correspondence referred to in the second part of the schedule, it is obvious that it is privileged.

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VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think the cases of *Reid v. L'Anglois*, and *Goodall v. Little*, may very well stand together. In the latter case the communications were between co-Defendants, and I think Mr. Roll's observation is perfectly just, that that decision may be sustained on the ground that the subject matter of the communication might be extracted from the Defendant who received the letter, as facts within his knowledge, by means of interrogatories on an amended bill. It signifies nothing in what shape the information is obtained; and if it could not be withheld on interrogatories, there was no reason for holding the document which contained it to be privileged. The Defendant, having received this information from a co-Defendant, could no more protect himself from disclosing it, when once he knew it, than if he had acquired the knowledge in any other manner.

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All these cases really turn upon the reasonable necessity, which, under the circumstances, may be considered to exist for the communications as to which privilege is claimed, in

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order to enable the litigant to obtain the benefit of legal assistance. On this principle Lord *Cottenham* acted in *Reid v. L'Anglois*.

As to the main point before me, the facts in *Reid v. L'Anglois* were on all fours with the present case.

The Defendant, there, in the body of his answer, did not put his claim of privilege higher than this: he said "that the letters mentioned and described in the second part of the schedule are confidential communications, which have passed between this Defendant or his agents on his behalf and his solicitors and legal advisers, and between the solicitors and legal advisers of this Defendant, after the matters in dispute in this cause had arisen." In the schedule itself the documents were thus described:—"Letters from the Defendant to *Robinson & Brooking*, the agents of the Defendant in *England*, to be communicated by *Robinson & Brooking* to Messrs. *Wadeson & Malleison*, the legal advisers of the Defendant in *England*." That is identical with the claim made in this affidavit as to the letters from the Plaintiff to Messrs. *Peabody*.

The question, therefore, resolves itself into this: Is a person resident in *America*, who has a litigation to carry on in *England*, bound to communicate directly with an *English* solicitor, or is he at liberty, without forfeiting his privilege, to send his communications through an agent. No doubt it might be possible to communicate by letter with a solicitor; but, considering the importance of personal communication in such cases, I think it most reasonable that a person resident abroad should have a confidential agent, an alter ego, in this country, who may communicate personally with the solicitor. Then are not communications so made to the agent to be regarded as privileged?

If this were not so, the Plaintiff, being desirous to file a

bill in *England* for an injunction, would have to write to Messrs. *Peabody*, under a sealed cover, a letter of instructions to be forwarded to some solicitor. Suppose a question arose requiring elucidation, which Messrs. *Peabody*, as the confidential agents of the Plaintiff, would be able to give, ought not the Plaintiff to have the benefit of such assistance? Or, again, the case may be put of a Plaintiff, a native of *Japan* or some other country, without any language in which to communicate immediately with a solicitor, is not he to have the aid of an agent and interpreter as a channel of communication between him and his solicitor? Even with more familiar languages, as *French* and *Spanish*, a similar necessity may arise; and in all cases where it can be said to be necessary to have an agent in *England* to superintend the conduct of a suit, communications made for the purpose of enabling him to do so will be privileged. I am glad to find that that has been so laid down in *Reid v. L'Anglois*, an authority which would conclude me even if I felt any doubt in my own mind, which I certainly do not. That case decides that a person resident abroad, and bona fide and reasonably employing an agent here as a channel of communication with his solicitor, is entitled to privilege for all the letters which he sends to the agent for that purpose. The letters between the agent and the solicitor must equally be protected. I must hold, therefore, that the Plaintiff is not bound to produce the letters from himself to Messrs. *Peabody*, or from Messrs. *Peabody* to the solicitors, nor of course any letters written by the solicitors.

There is a third class of letters—those from Messrs. *Peabody* to the Plaintiff—not covered by the claim of privilege as it is worded. There is no statement that these letters were sent in consequence of communications from the solicitors. As to these I shall follow the common prac-

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tice of giving an opportunity to correct the claim of protection by a further affidavit, and it will depend on its terms whether the order for production ought to be made.

With respect to the ledger and other books stated to be in constant use, I hold, as I have done before, that the same rule applies to books whether in *England* or abroad. They must equally be produced; but daily business ought not to be stopped in a foreign country any more than in *England*. But the form of the affidavit here is not quite as full as it should be in accordance with the practice. The affidavit in *Reid v. L'Anglois* is an example of the proper form. It states not only that the books are in daily use, but that they cannot be removed to *England*, or taken out of the possession of the Defendant, without great inconvenience to him and his business. There must be a further affidavit, setting out more fully the inconvenience of bringing to *England* the books stated to be in constant use. The correspondence must also be set out more fully.

Minutes.

PLAINTIFF to be at liberty, within ten months, to make and file a further affidavit as to the letters from Messrs. *Peabody* to the Plaintiff. Also, as to the books stated to be in constant use. The summons for their production to stand over. The Plaintiff to make an affidavit setting out the correspondence more fully.

July 17th.

On appeal, the order was affirmed, with an addition framed to include in the further affidavit the letters from the Plaintiff to Messrs. *Peabody*, as well as those from Messrs. *Peabody* to the Plaintiff, it being considered that the confidential and professional character of the contents of the letters was not stated with sufficient precision.

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SHALLCROSS v. OLDHAM.

THIS was a bill by the owners of a ship against the late master, praying an account of his dealings respecting the ship, and seeking to charge the Defendant with the profits of a cargo shipped by him on his own account on board the vessel.

In August, 1858, the Plaintiffs appointed the Defendant master of their ship, the *Golden Eagle*, and gave him a letter of instructions to sail with a cargo to *Lima*, and, after discharging, to procure a cargo direct home, unless a better paying offer for an intermediate voyage should be obtained. The letter proceeded "Our principal object is to make the vessel pay;" and, after other directions, authorised the master to draw for any deficiency of the *Lima* freight to cover disbursements, and instructed him to remit any surplus.

The vessel had to put in at *Rio* for repairs; and the master wrote to the Plaintiffs that he intended to make an intermediate voyage, which was not objected to by the Plaintiffs.

On November 10th, 1859, the Plaintiffs wrote to the Defendant, instructing him when he made a remittance for freight to see that he got a good bill.

On December 26th, 1859, the Defendant wrote to the Plaintiffs a letter containing these passages: "Failing a paying freight home from *Melbourne* and any profitable employment for the vessel, I see nothing for it but purchasing a cargo of coals at *Newcastle*, near *Sydney*, on your account, running over to *Shanghai*, where I should be to windward of all the loading ports, and also have the choice

Jan. 27th &
28th.

Ship—Master
—Liability to
account—Pro-
fits—Trustee.

The master of a ship, who, having authority to employ the vessel on freight to the best advantage, but not to purchase a cargo on the owners' account, and being unable to procure remunerative freight loads the ship with a cargo of his own:—*Held*, liable to account to the owners for all profits made by the sale of the cargo, and not merely for a proper freight.

The general principle, that a trustee cannot make a profit for himself by the use of the trust property, applies to an agent intrusted with a ship or other chattel for the purpose of using it for the owners' benefit.

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of a selling market and take first paying freight home, which I think we may get with size and class in our favour." . . . "Again, I say, that nothing will induce me to speculate in coals to *China* but the absolute failure of all profitable employment for the ship." [This letter was accidentally delayed, and was not received by the Plaintiffs until *March 7th, 1860*].

On *February 16th, 1860*, the Defendant wrote stating that by next mail he would send account of disbursements, and remittance through *Union Bank of Australia* of balance of freight.

After some intermediate trips the ship arrived at *Melbourne* on *February 2nd, 1860*; and on *March 6th* the Defendant wrote to the Plaintiffs advising a draft of his own for £225 on account of the then balance of freight, amounting to £303, and stating that he could get no remunerative employment, "there was nothing for it but seeking;" and that he "would go to *Newcastle*, near *Sidney*, purchase a cargo of coals on his own account, give the ship 15s. per ton freight, and proceed to *Hong Kong* to dispose of it and get loaded for home;" and added, that, "having no authority from the Plaintiffs, he did not dare risk their money on the ship's account."

On *May 8th, 1860*, being the first mail after the receipt of the letter of *March 6th, 1860*, the Plaintiffs wrote, "We were glad to observe by your letter of *December 26th, 1859*, that it was your intention to purchase a cargo of coals on our account and run to *China* if all else failed;" and added, that they should have approved by letter if the letter of *December 26th* had not been delayed; and that, as to Defendant's offer of 15s. freight, they would relieve him of all risk, and take the profit or loss of the venture on themselves.

In the meantime the Defendant had purchased coals on his own account; and on April 5th, 1860, sailed for *Hong Kong*, where he sold them; and, after another trip with coals partly on freight and partly bought on ship's account, ultimately returned home.

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On July 3rd, 1860, the Defendant, after receiving the Plaintiffs' letter of May 8th, wrote in explanation that the only offers he had at *Melbourne* were certain unprofitable offers for distant parts; that shippers of coals to *China* had refused to give 20*s.* per ton, for which he had offered to go; and added, "on my saying I would risk it myself, they strongly advised me not; in the face of which I dare not risk your money."

The Defendant, in rendering his accounts, did not credit the Plaintiffs with the profits on the resale of the first cargo of coals.

This bill was accordingly filed for an account, and to charge the Defendant with the profits of the cargo of coals, and also for an injunction to restrain proceedings at law or in the Court of Admiralty. An interim injunction had been obtained, and the case now came on upon motion for decree. Evidence was given by the Defendant, the material part of which is stated in the judgment.

Mr. *Rolt*, Q.C., and Mr. *Eddis*, for the Plaintiffs:—

The Defendant was a trustee, having power to use our ship to the best advantage for the owners. He has used it to make a profit for himself, and must account on the same footing as any other trustee making a profit out of trust property: *Thompson v. Havelock*(a), *Diplock v. Blackburn*(b), *Gardner v. M'Cutcheon*(c).

Argument.
 ———

If it were necessary to dwell upon it, it is evident that

(a) 1 Camp. 527. (b) 3 Camp. 43. (c) 4 Beav. 534.

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his cargo was purchased with the Plaintiffs' money; but without that he is liable to account.

Mr. Brett, Q.C. (of the Common Law Bar), and Mr. C. C. Barber, for the Defendant:—

The case is simply that the Defendant, having authority to get the best freight he could, and not being able to find an advantageous cargo, loaded the ship himself with his own goods, at a higher freight than he could have obtained from any one else. This was within his authority as master, which is necessarily very extensive, especially under the large instructions which he received to make the ship pay: In *Valin's Comm. sur l'ordonnance de la Marine* (a), it is said, that a master or part owner may load his own goods on freight.

I admit, that where a trustee uses without authority the property of the trust, he must account; but the only question of account here is, what is a proper freight with which to charge the Defendant. The coals were no part of the trust property, and when he bought them he had no authority to buy them with the Plaintiff's money. He therefore invested his own money. It was a case of necessity, and the Defendant did the best thing for the ship.

[The VICE-CHANCELLOR.—If a person placed in a house for the purpose of letting it uses it to carry on a trade, or as a warehouse, would he not be liable to account for the profits so made?]

Mr. Brett.—I submit not, though he would be chargeable with a proper occupation rent. If a servant in charge of a van uses it in carrying his own goods to market, is it to be said that all the profits, not only of the carriage—which would be right enough—but of the sale of the goods, however valuable, are to go to the owner of the van?

(a) Liv. 2, tit. 1, art. 28, pp. 427-8.

Further, this is a case for the Common Law or Admiralty Court. There is no ground for coming into equity.

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Mr. *Rolt*, in reply.—As to the jurisdiction, it is enough that the account can be more conveniently taken here; and, besides, this is a case of breach of trust.

It is argued that the Defendant had no authority to buy on account of the Plaintiffs; but this is immaterial. The point is, that he had no authority to freight the ship with his own goods. Nor is it material, even supposing it to be true, that, by freighting the ship himself, he conferred a benefit on the Plaintiffs. There was no necessity to do so, as he might have come home in ballast; and certainly nothing short of necessity could give such an authority, even to the master of a ship. It is just as if the trustee of a mill and machinery worked the mill with his own capital, when he would be liable to account to his cestui que trust for all his profits.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Jan. 28th.
—
Judgment.

In this case the question is, how far the master of a vessel belonging to the Plaintiffs was, under the circumstances proved, justified in making use of the vessel, by shipping a cargo of coals on his own account, and whether he is bound to account for the profits of the cargo, or only to pay a freight to the owners.

For the Plaintiffs the case was argued on the general principle that an agent cannot avail himself of anything entrusted to his charge for the purpose of making a profit for himself. The Defendant's case was ingeniously put in this shape: It was admitted as a general principle that the Defendant could not use the Plaintiffs' property for his own

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benefit; but it was said that he had authority to do the best that could be done for the vessel; and that it was only when he had failed to get a better freight from any one else that he invested his own capital in a cargo, and loaded the ship with it, charging himself with a proper freight.

I think it of some importance to refer to the view taken by the Defendant himself of the best mode of employing the ship. This appears from his letter of December 26th, 1859, to his employers, who at that time had not authorised him to purchase goods on their account, or to employ the vessel otherwise than by obtaining freight. In that letter he says: "Failing a paying freight home from *Melbourne*, and any profitable employment for the vessel, I see nothing for it but purchasing a cargo of coals at *Newcastle*, near *Sydney*, on your account, running over to *Shanghai*, and taking first paying freight home." At this time, therefore, his view of the best mode of employing the ship, in the event of freight failing, was to buy coals on the owners' account, and endeavour to sell them at a profit, and in that way earn a paying freight for the ship, and take her to a port where she was likely to find a home cargo. He does not say he shall do this without the owners' consent, but he does throw it out as his purpose if everything else fails. By accident that letter was not received until it was too late for the owners to write to the master at *Melbourne*. In consequence of this the Defendant found himself in *Australia* without any answer to his proposal; and, so far as any presumption could be grounded on that, the inference would be that the Plaintiffs did not object to the course proposed. However, it seems that the Defendant reflected that he might have gone too far in intimating that he would purchase coals without having any distinct authority for so doing, and he thereupon proceeded (as he says) in this way: He searched for freight, but found it very difficult to be obtained. He could find none at 25s. per

ton, or even at 20s., and failing that he consulted with the agent, and asked whether he would authorise a speculation in coal, but he had not authority for the purpose, and could not do it. Then the Defendant invested in coals with moneys of his own, and sailed for *Hong Kong*, although, as he says, he was told that it was a losing speculation. He informed the owners of what he had done, and that he charged himself with 15s. per ton freight. Why he should have put it at this rate is not obvious. However, he made no concealment of the rate at which he charged himself, although it was 5s. less than the last offer which he had made to strangers.

Accordingly, on March 6th, 1860, he writes that there is no remunerative employment to be had, "nothing for it but seeking," and says that he will "purchase a cargo of coals on his own account, and give her (the ship) 15s. per ton freight, and proceed to *Hong Kong*," where he hoped to dispose of the cargo, and get loaded for home, adding a postscript, "Having no authority from you, I dare not risk your money on ship's account. We sail to-morrow." By the same letter he states the balance of freight at £303, part of which he pays by drawing a bill of his own.

The transaction was, therefore, perfectly free from disguise; but it is open to the observation, that, though he says he was told that coals were not likely to pay, he nevertheless entered into the speculation for himself. He does not state what money he had; and it appears that he did not remit good bills purchased in the market for the freight, but drew bills of his own, and must be assumed to have retained and employed for his own use the money earned by the ship. That, in fact, amounts to discounting his own bill with his owners' money. There is no trace of any intention to defraud; but still he did avail himself of his employers' money in his hands, when it is by no means clear that he could, merely upon his own bill, have

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raised the money for his purchase. However, I pass all this by, because I shall decide the case upon higher grounds. In the view I take, it is not material to inquire into the details of this part of the transaction.

The great question (though it is one which appears to me to be concluded by the principle which all the authorities establish) is, whether the Defendant had a right to employ the property entrusted to his charge for his own benefit. The case of a van used by a servant to carry his own goods was put in argument; but that does not appear to me to shake the principle, that, where a chattel is entrusted to an agent to be used for the owner's benefit, all the profits which the agent may make by using that chattel belong to the owner. The nearest case which was suggested is perhaps that of a trustee in possession of a mill and machinery; and I think it clear that if the trustee invested his own capital in working it, he would be bound to account to his *cestui que trust* for all the profits made by the use of the mill.

The citation made from the *Commentaire sur l'ordonnance de la Marine* does not affect the question. That is merely a qualification of the general doctrine, that a part owner of a vessel cannot load the vessel with his own property, the qualification being, that where the partnership is only in the freight, he may put his own goods on board, accounting for the freight. That merely means that in a general trading ship, open to cargo from any one, a part owner of the freight may put his own goods on board among others, and does not touch the case of an agent employing for himself the whole vessel entrusted to him for the purpose of seeking freight.

It was quite possible, that, after buying the coals, the Defendant might have heard of a more profitable employment for the ship. The moment he fixed the destination of the

ship for *Hong Kong*, to carry his own coals, he placed his duty and his interest in conflict.

On these grounds I think it unnecessary to go into the inquiry out of what moneys the coals were paid for. There is no doubt that the account is one which it is proper for this Court to take, because the bill is founded on an equitable right to relief, which draws with it all such accounts as may be consequential upon it.

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Minutes.

DECREE for an account as prayed, with a direction that the Defendant is to be charged with any profit made by the sale of the coals. Injunction continued—The Defendant to pay the costs up to the hearing.

EDWARDS v. SPAIGHT.

THIS was a motion on behalf of the Plaintiffs, that the Defendants should produce a witness (a solicitor resident in *Australia*) before the examiner of the Court for cross-examination; and that, in the meantime, the hearing might be postponed; and that the Defendant should pay the costs of the application.

June 12th.
Practice—
Cross-examination—Special
Examiner—
Order Feb. 5,
1861, Rule 19.

A witness who has made an affidavit may be cross-examined either before one of the examiners of the Court or a special examiner, and in the case of a witness abroad the proper course is to apply for a special examiner.

Time will not be enlarged to allow of affidavits in reply being filed after cross-examination of a witness on the other side.

Mr. *Giffard*, Q.C., and Mr. *Turner*, for the motion, referred to the 19th Rule of the Order of 15th February, 1861.

Mr. *Rolt*, Q.C., and Mr. *Nugent*, for the Defendant:—

The application ought to have been for a special examiner. The word “examiner” in the Order includes a special examiner. Before the Order, it was decided that a party could not be compelled to come to *London* to be cross-examined, and that the course was to apply for a special examiner: *Wellesley v. Mornington* (a), *Rawlins v. Wickham* (b). It is impossible to bring the witness here.

(a) 5 W. R. 393.

(b) 4 Jur. N. S. 990.

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Argument.

Mr. *Giffard*, in reply.—It was for them to ask for a special examiner, to which we do not object. We did not apply in this form, because it was doubtful whether the Order applied to a special examiner.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The motion asks that the witness may be produced before the examiner of the Court, and to postpone the hearing, and that the Defendant may pay the costs. I see no reason why he should pay the costs under any circumstances; and here the form of the application is improper. The 19th Rule, under which the motion is made, does not require in terms that the cross-examination should be before the examiner of the Court in *London*. It says, "the examiner," which may mean either the ordinary examiner, or a special examiner appointed for the occasion. In another part of the same Order the phrase is, "one of the examiners of the Court, or a special examiner." But though the alternative is not expressed in the 19th Rule, I think both kinds of examiners are included. The 22nd Rule plainly contemplates cross-examination before a special examiner; and the right course under the circumstances of this case would have been to move for a special examiner.

The cause must stand over till further order, and a special examiner, to be named in chambers, must be appointed. The Plaintiff must pay the costs of the application.

Mr. *Giffard* asked that the time for evidence should be enlarged sufficiently to allow of a reply after the cross-examination.

VICE-CHANCELLOR SIR W. P. WOOD.—There is nothing in the Orders to authorise that. It is not the practice to enlarge the time for evidence by reason of cross-examination.

RE WILSON'S ESTATE.

THIS was a petition by Sir T. M. Wilson, tenant for life of the manor of *Hampstead*.

The *Hampstead Junction Railway Company* gave notices for taking certain lands copyhold of the said manor, and also certain freeholds subject to the same limitations as the manor.

On the 9th of March, 1860, two agreements were signed by the petitioner and by an agent on behalf of the Company, the one relating to the freeholds and the other to the copyholds, by which *J. Clutton* was appointed sole arbitrator, to ascertain the amount of compensation to be paid for the freeholds and for the enfranchisement of the copyholds respectively.

On the 15th of June, 1860, the arbitrator awarded £4,698 as and for compensation for the enfranchisement of the copyholds, according to the 96th section of the *Lands Clauses Consolidation Act, 1845*; and on the same day awarded £6,352 as compensation for freeholds permanently taken and for permanent injury, £450 for temporary occupations of other freeholds, and £200 for the value of sand taken from the last-mentioned lands.

It appeared in evidence that valuers had been appointed on behalf the of Petitioner and the Company respectively; that they differed as to details, and in particular with respect to the freeholds as to a claim of £500 as royalty on bricks manufactured by the Company; and ultimately, without agreeing as to details, the valuers concurred in fixing the lump sums before mentioned as the several amounts of compensation; and at a meeting with the arbitrator this agreement was announced, and the award was made accordingly.

1862.

July 25th, 26th.

Railway Company—Lands Clauses Consolidation Act—Copyhold Enfranchisement Acts (15 & 16 Vict. c. 51, 21 & 22 Vict. c. 94).

A Railway Company enfranchising under the provisions of the *Lands Clauses Consolidation Act, 1845*, is not bound by the provisions of the *Copyhold Enfranchisement Acts, 1852 and 1858*, requiring payment of fines to the lord as a condition of compulsory enfranchisement.

If a tenant for life of a manor obtains from a Railway Company payment of such fines, the sum received (not being legally enforceable against the Company), cannot be retained by the tenant for life, but must be applied as part of the compensation for the benefit of the inheritance.

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There was in like manner a difference as to the details of the enfranchisement compensation, the Petitioner's valuer claiming a royalty of £200 on bricks, and also £1,016 as the amount of the fines which would be payable under the Copyhold Act, 1852 (15 & 16 Vict. c. 1, s. 6) to the lord of the manor before proceeding to a compulsory enfranchisement. The valuers, however, agreed as to the total compensation, and the award was accordingly made.

The conveyances having been executed, and the compensation paid into Court, the Petitioner prayed that the above sums of £450, £200, and £500, part of the freehold compensation, and £1,016 and £200, part of the enfranchisement compensation, might be paid to him as part of the profits of his life estate, and for investment of the residue and payment of dividends.

On the original hearing of the petition, £450 and £200 were ordered to be paid to the Petitioner; and an inquiry was directed, in answer to which the Chief Clerk certified—

1. That Sir *T. M. Wilson* was not entitled as tenant for life to any royalty on bricks made from the freehold land.

2. That there would, under the circumstances, have been payable under the 6th section of the 21 & 22 Vict. c. 94, from certain copyholders admitted prior to 1st of July, 1853, the sum of £1,016 as fines; and that the Petitioner as tenant for life was entitled to the same.

The petition now came on upon the certificate, the only point in controversy being the claim to the fines.

Argument.

Mr. *Rolt*, Q.C., and Mr. *Hetherington*, for the Petitioner, cited the Copyhold Enfranchisement Act, 1852 (*a*), s. 1; the Copyhold Enfranchisement Act, 1858 (*b*), s. 6; the Lands Clauses Consolidation Act, 1845, ss. 95, 96; and contended

(*a*) 15 & 16 Vict. c. 51.

(*b*) 21 & 22 Vict. c. 94.

that the provisions of the General Copyhold Acts, as to the payment of fines as a condition of enfranchisement, applied to land taken by a railway company. The Petitioner was therefore entitled as tenant for life to the sum of £1,016, as found by the Chief Clerk.

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Mr. *Daniel*, Q.C., and Mr. *Hanson*, for the remaindermen:—

The enfranchisement took place under the powers of the Lands Clauses Consolidation Act; and the conditions imposed under subsequent Acts with respect to fines to be paid to the lord for the time being, as a preliminary to compulsory enfranchisement, have no application to a proceeding by a railway company under the powers of a distinct Act, which contains no analogous provisions.

In point of fact the money has been paid into Court simply as compensation, assessed in the lump by the arbitrator. It must, therefore, be applied in the manner in which compensation is directed by the Lands Clauses Consolidation Act, (sect. 69), to be applied, namely, for the benefit of the inheritance. [They cited *Ecclesiastical Commissioners v. London and South Western Railway Company (a)*.]

Mr. *Hetherington*, in reply:—

The Copyhold Acts are perfectly general; and whatever may have been the case before, a company has now no more right than any other person to enfranchisement, without first paying the lord his fines.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The case has been extremely well argued on both sides; but it appears to me quite clear that the Petitioner's claim

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 Judgment.

is unfounded. The tenant for life had no right, as against the Company, to insist on the payment of the fines in question ; and if, as appears likely, this sum entered into the calculations of the arbitrator, the result merely is, that Sir *Thomas Wilson* made a very good bargain, the benefit of which must enure for the good of the inheritance. The fines were not specifically included in the award, which was for a lump sum ; but supposing that Sir *Thomas Wilson* had succeeded in persuading the Company expressly to pay to him a sum on this account, which was not legally due, I apprehend that, as between him and the remaindermen, he could not appropriate to himself any portion of what he had received beyond the amount legally payable by the Company to the tenant for life. No part of the compensation payable under the 73rd section of the Lands Clauses Consolidation Act can go to the tenant for life. The question, therefore, comes to this : was the demand of Sir *Thomas Wilson*, in respect of these fines, sanctioned by law, as between him and the Railway Company ? Upon the language of the statutes, I feel no doubt upon the point.

The Lands Clauses Consolidation Act was passed in 1845, before tenants had the power of compelling a lord to enfranchise ; and by that Act, sects. 95, 96, Railway Companies were enabled to proceed to enfranchisement, and were required to do so, no fine being payable by them to the lord on this account. This was the state of the law from 1845 to 1852, when certain powers were given to copyhold tenants of compelling their lord to enfranchise, on paying a certain price, to be ascertained in the manner directed by the Copyhold Enfranchisement Act, 1852. It was left, however, at the option of the tenants to avail themselves of the privilege or not, as they pleased ; and the condition was annexed, that the lord should not be compelled to enfranchise except on the terms provided by the Act, including the payment of certain preliminary fines.

The Railway Company contend, that they do not come under this Act at all, but under the powers previously given to them by the Lands Clauses Consolidation Act; and assuming this Company to have been incorporated, as is stated, only in 1853, still their demand for enfranchisement was made independently of the Act of 1852; and they had a right to insist on the lord enfranchising on the terms of the Lands Clauses Consolidation Act, and moreover were (unlike ordinary tenants) themselves compellable by the lord to proceed to enfranchisement. They did not come as suitors for enfranchisement, but demanded their rights on the terms contained in the Act of 1845. The two modes of enfranchisement appear to me entirely distinct.

The case has been argued on the footing of the Act of 1852; but there was a subsequent Copyhold Enfranchisement Act of 1858, passed before the award was made, though after the reference. This statute, therefore, cannot affect the question; and even if the dates had been different the reasoning would be the same with reference to this as to the Act of 1852. Under the 95th section of the Lands Clauses Consolidation Act, every conveyance to a Railway Company of copyhold lands is to have the like effect as if the lands had been of freehold tenure; nevertheless, until such lands shall have been enfranchised under the powers of the Act, they are to remain subject to the same fines, heriots, and services as were theretofore payable and of right accustomed. So far it is quite plain that no fines are made payable as a premium for exercising the privilege given by the Act, as is done by the Act of 1852, which enables tenants to enfranchise. Under this clause, therefore, the Company would continue liable to the accustomed fines until enfranchisement, but could not be compelled to pay a premium for enfranchisement, as required from tenants by the Act of 1852.

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Rth WILSON'S
ESTATE.
Judgment.

1862.
 RE WILSON'S
 ESTATE.
 Judgment.

Then the 96th section directs that the promoters of the Company shall procure the lands taken to be enfranchised, and for that purpose shall apply to the lord, and pay to him such compensation in respect thereof as shall be agreed or determined, as in other cases of compensation. The words "shall procure the lands to be enfranchised," might be thought to imply that the Company is to come like any copyholder and procure enfranchisement on the same terms and in the same manner as he might do. On this construction the lord might insist on a right to treat the Company exactly as an ordinary copyholder applying for admittance and enfranchisement. But it was decided in a case which has been cited, where the conveyance to the Company was before the passing of the Act of 1852, that no fine was payable by the Company on the conveyance under the 95th section, and that the Company was in a position wholly distinct from that of an ordinary copyholder.

I think the question is very clear, and that, even if the Company had submitted to the demand of these fines *eo nomine*, still, as they were not bound to do so, the tenant for life would not be entitled to retain the benefit, which must enure for the good of the estate. In a case before Lord *Langdale*, in which I was counsel, a tenant for life, who had stipulated for a sum of £5,000 as compensation for his personal inconvenience, was compelled to give it up for the benefit of the inheritance.

I am bound to add, that the evidence does not bring the case up to the point I have supposed. All that can be said is, that the details of the claim were laid before the agent of the Company; and that, without assenting to any of them, a lump sum was agreed to be paid, not specially as to any part of it *qua* fines or premiums. But it is not necessary to

go into this matter, because, apart from these facts, I hold that in no case would the tenant for life be entitled to the fines claimed.

1862.
RE WILSON'S
ESTATE.
Judgment.

VARY certificate by declaring that Sir T. M. Wilson is not entitled to the amount of the fines.—Costs to be paid by the Company according to the Act. The remaining costs to be paid as between solicitor and client out of the fund.—Residue to be invested, and dividends to be paid to the tenant for life.

Minutes.

3 Ch 389

ORIENTAL INLAND STEAM COMPANY
(LIMITED) v. BRIGGS.

THIS case came on upon demurrer.

The Plaintiffs were a limited Company registered on December 18th, 1856. The bill stated the following clauses of the Articles of Association :—

Clause 3 empowered the Directors to allot and issue 25,000 £10 shares, and directed that the allottees should testify their acceptance thereof in writing in such form as the Company should direct, and thereupon become shareholders in the Company.

Clause 19 authorised the Directors to make calls, no one call to exceed £2; and provided that advertisements thereof should operate as notice to all shareholders.

Clause 21 provided, that, in case any call should remain unpaid for three months, the Board of Directors might declare the shares in respect of which default had been so made, forfeited; but nothing therein contained was to pre-

1861.
June 26th.
Joint Stock
Company—
Undertaking to
accept Shares—
Specific Per-
formance.

In a case where there is a clear contract to accept shares, and the remedy at law is shown to be inadequate, the Court will decree specific performance.

But where the validity of the contract to accept the shares was doubtful, and the inadequacy of the legal remedy not clearly made out, and there having been an unexplained delay of two years, a demurrer to a bill for specific performance of a contract to accept shares was allowed with costs.

1861.
 ORIENTAL
 INLAND
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vent the Board from enforcing payment of calls due notwithstanding such forfeiture.

Clause 62 made interest at £5 per cent. payable on calls in arrear.

Clause 82 enabled the Board, when one-fourth of the said 25,000 original shares had been taken, to increase the capital to an amount not exceeding £1,000,000, by the issue of new shares, and to allot all or any of the new shares to existing shareholders in the proportion of three new shares to one original share; and directed, that, in the event of any such shareholder declining or neglecting to accept the said new shares within any reasonable time that might be fixed by the Directors, they should have power to allot the unappropriated shares to any other person; that all such new shares should be numbered on the register in continuation of the original shares; and that when any new shares should be created the Board were to prepare a writing testifying acceptance thereof, and cause the same to be subscribed by the persons to whom such new shares should be issued, allotted, sold, or disposed of; and every such person on subscribing such writing should become an ordinary shareholder in respect thereof, and be on the same footing as an original shareholder.

The bill also contained the following allegations:—

In February, 1859, more than one-fourth of the original shares had been taken, and the Board of Directors increased the capital to £500,000 by the issue of 25,000 new £10 shares.

On February 12th, 1859, the Defendant, who was then a shareholder in the Company, signed and sent to the Directors a letter of application as follows:—

“I request that you will allot to me 150 of the new issue of shares in this Company; and I hereby undertake to

accept the same or any less number that may be allotted to me, to pay the calls thereon when due, and to sign the Articles of Association when required."

The Defendant at the same time paid the required deposit of 2s. per share.

On March 5th, 1859, the Directors duly allotted to the Defendant 150 of the said new shares, and a letter was sent to him by the Secretary, as follows :—

"Your application for 150 shares in the above undertaking having been laid before the Directors, I am desired to inform you that 150 shares have been allotted to you. The banker's receipt must be exchanged when required for a share certificate under the seal of the Company, and the memorandum and Articles of Association of the Company must be signed by the party to whom the shares are allotted, and in default thereof the shares and deposit will be forfeited to the Company."

Shortly afterwards the Directors entered the Defendant's name on the Register of Shareholders as holder of the said 150 shares, and his name had since remained on the Register, and been returned to the Registrar as holder thereof. Calls were made on the new shares on March 1st, 1859, of £1:18s., payable in May, 1859; on May 31st, 1859, of £2, payable in August, 1859; on May 15th, 1860, of £2 payable in July, 1860; and on October 30th, 1860, of £2, payable in November, 1860; and notices thereof were duly given to the Defendant. On May 13th, 1859, the Directors called upon the Defendant to sign the Articles of Association; and on March 2nd, 1860, again desired him to sign them. But he neglected and refused to do so, and paid none of the said calls.

Until the end of 1860, no form of acceptance was required by the Directors except signature of the Articles.

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 ———
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On May 3rd, 1861, the Company applied to the Defendant to sign a form of acceptance of his said shares, which he neglected and refused to do.

The bill prayed that the Defendant might be decreed to sign the Articles in respect of the said 150 new shares, and to sign such other written acceptance as the Court should think necessary; and to pay the calls with interest. To this bill the Defendant demurred.

Argument.
 ———

Mr. Rolt, Q. C., and Mr. Locock Webb, for the demurrer, argued that the letter of allotment was not a simple acceptance of Defendant's application; that there could be no specific performance of a contract to take shares, the remedy being at law; and that the Company was at any rate barred by laches.

[They cited *Hercy v. Birch* (a), *Sheffield Gas Company v. Harrison* (b), *Jackson v. Cocker* (c), *Wontner v. Shairp* (d), *New Brunswick Company v. Muggeridge* (e), *Duke v. Andrews* (f), *Willey v. Parratt* (g), *Chaplin v. Clark* (h).]

Mr. Cotton (Sir H. Cairns with him) for the bill:—

There is no adequate remedy at law. An action for damages on each call would be circuitous, and we are entitled to a complete remedy once for all. Moreover, we have no title to bring an action at law for calls before the formal acceptance of shares, as the 3rd clause of the Articles excludes liability as a shareholder until acceptance in writing of the shares.

There is no analogy between the case of a Company and that of an ordinary partnership; and the decision of

(a) 9 Ves. 357.

(b) 17 Beav. 294.

(c) 4 Beav. 59.

(d) 4 Railw. Cas. 542.

(e) 4 Drew. 686.

(f) 5 Railw. Cas. 496.

(g) 6 Railw. Cas. 32.

(h) Id. 193.

the Master of the Rolls in the *Sheffield Gas* case is not law, and has been in effect overruled by *Shaw v. Fisher* (a). *Cheale v. Kenward* (b), and *New Brunswick Company v. Muggeridge* are also favourable to our view.

As to the alleged variance between the application and the letter of allotment this is immaterial, as no letter was requisite. It was enough that the Directors "duly allotted the shares," as the bill avers that they did; and the Defendant would then be bound even without any letter from the Secretary. There was no laches, for notices of calls and requests to sign the Articles were repeatedly sent to the Defendant from time to time.

Mr. Rolt replied.

1881.
ORIENTAL
INLAND
STEAM COM-
PANY
(LIMITED)
v.
BRIGGS.
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This demurrer raises the question mooted in the case of *The Sheffield Gas Company v. Harrison*, before the Master of the Rolls, and in *The New Brunswick Company v. Muggeridge*, before Vice Chancellor *Kindersley*. Although the view of the Vice-Chancellor appears to be opposed to that of the Master of the Rolls, there is in reality no variance in principle between the decisions, when the doctrine laid down (and no doubt correctly laid down) by the Vice-Chancellor is considered.

Judgment.

The *Sheffield Gas Company* is described by the Master of the Rolls in his judgment as a partnership, in which, according to the terms of the deed, any person after becoming a shareholder could cease to be partner within fourteen days; and the decision turned entirely on this option of a shareholder to annihilate his shares at will. The Master

(a) 2 De G. & S. 11.

(b) 3 De G. & J. 27.

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 ORIENTAL
 INLAND
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 ———
Judgment.

of the Rolls held, that a contract to take shares in such a Company was within the rule laid down by Lord *Eldon*. But that rule, as Vice-Chancellor *Kindersley* observes, was not that a contract for partnership is in itself such a contract as a Court of equity will not specifically enforce; but that a contract being for a partnership without any time fixed for its duration, the Defendant might dissolve it the next moment; and therefore it would be idle to compel the formation of such a partnership. In the *New Brunswick Company* the holder of shares had no power to annihilate his shares, but could only get rid of them by finding some one else willing to accept a transfer.

The observations of Vice-Chancellor *Kindersley* upon this point are very material. He says: "I certainly accede to the proposition, that, if the Defendant, having signed an acceptance in writing of the 250 shares, and having thus become a shareholder of the Company, could then immediately retire from the Company, and leave the parties in the same condition as if he had never been a shareholder, so that the Plaintiffs would have received no benefit from his having taken shares, this Court would not enforce the contract."

That language appears accurately to describe the very case of *The Sheffield Gas Company*; and so far there is no conflict between the two authorities. The Vice-Chancellor, no doubt, subsequently made some observations, in which the precise effect of the case at the Rolls was perhaps overlooked; but in reality there is nothing to prevent the two decisions standing together. Cases may very well arise in which specific performance of a contract to take shares may be properly decreed, though, with the exception of *Shaw v. Fisher*, there is no example of a decree to this effect. The rule is clear and simple, that where the Court perceives that justice cannot be done at law it will interfere by decreeing specific performance, or

otherwise giving complete relief, or, under other circumstances, will supply the defects of the legal remedy, and enable the Plaintiff to proceed effectually at law.

The present case is put upon that ground ; and it is easy to suggest possible cases where no adequate relief could be obtained at law, and where specific performance would be the proper course. But there are serious difficulties in the way of such a decree upon the facts before me. One of these arises on the terms of the alleged contract itself. The Defendant's offer contains a clear undertaking to accept the shares if allotted, to pay calls, and to sign the Articles. He also paid the deposit. Thereupon the Directors of the Company, as it is alleged in the bill, "duly allotted to him 150 of the said new shares." It is contended, that that is sufficient to make a complete contract; but I apprehend that some communication of the allotment must be made to the shareholder before his undertaking can be said to ripen into a mature contract. What is done is this: The Secretary informs him by letter that 150 shares are allotted to him, and proceeds to state certain conditions: the receipts must be exchanged for share certificates, the memorandum and Articles must be signed (all which may be the simple consequences of the allotment); but then it is added, that "in default thereof the shares and deposit will be forfeited to the Company."

There is no power to do this given by any of the clauses set out in the bill. The 82nd clause, after directing the allotment of new shares to be made in the first instance to existing shareholders, empowers the Directors on their declining the shares to issue them to others; but that scarcely goes the full length of the power claimed by the Secretary's letter, for the clause is silent as to forfeiture, and is evidently framed *alio intuitu*—viz. to compel the Board to make the first offer of new shares to the existing shareholders. It does not seem to contemplate any application

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for shares, or any deposit. However this clause be read, there is a very grave question, whether the letter of allotment does not impose a new condition, which formed no part of the Defendant's offer. The Defendant, who was an old shareholder, tendered for the new shares, and paid his deposit on the footing of the Articles, which told him nothing about liability to forfeiture of his deposit. All that he could find in it of the nature of forfeiture was, that, if he declined the shares, they might be allotted to some one else. I have great doubt, therefore, whether there was any valid contract at all. But the case does not rest there. Assuming, that, on the Company intimating their view of the contract, the Defendant acquiesced, or even that he accepted this as a new term of the bargain, the term is, that, on failure to comply with certain conditions his shares and deposit will be forfeited. There is no express reservation (as in the 21st clause) of the right to sue for calls notwithstanding the forfeiture of the shares; but merely a stipulation, that, if he neglects to accept the shares within a reasonable time, the Directors shall have power to allot them to some one else.

The course taken by this Company is this: They register the Defendant as the holder of these shares; they make a series of calls, of which notice is given to the Defendant; and on the 13th of May, 1859, they send him a letter, requiring him to sign the Articles; and a second letter is sent on March 2nd, 1860, again desiring him to sign the Articles. It is only after this second application, according to the strict statement of the bill, that the Defendant "neglected and refused so to do."

Consequently, the facts may be thus summed up: Notice in March, 1859, that in default of taking up the shares the deposit will be forfeited; then two applications made in March 1859, and May, 1860, and after this a refusal by the Defendant. Assuming this to bind the Defendant and

entitle the Company to treat him as a shareholder, still it is important to consider the time when they first attempt to do so. Taking the view most favourable to the Company, they retain in their hands the power of forfeiting the shares, and also at the same time of suing for calls. In such a case there ought not to be a day's unnecessary delay; and the facts on the face of the bill are, that this commercial Company, finding that an allottee of shares does not pay a single call, or answer a single letter, and that he refuses to execute the articles, wait two whole years (until May, 1861) before they attempt to enforce his undertaking to accept the shares, and this without anything to excuse the delay, although it was equally competent to them to file their bill in May, 1859.

The contract itself appears to be of doubtful validity; though, if the case were otherwise a proper one for specific performance, the difficulty on this ground might possibly be got over.

Independently of these observations I should hesitate much, in the absence of authority, before decreeing specific performance of a contract to take shares, without some special grounds (which no doubt may easily exist in particular cases) to show the inadequacy of the remedy at law.

In the third place, the delay of two years is quite inexcusable. Upon all these grounds, therefore, though chiefly upon the last, I feel compelled to allow the demurrer with costs.

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1862.

Feb. 11th & 21st.

Will—Con-
struction—An-
nuity—Sum
certain per an-
num—whether
perpetual—
Rate of Interest
—Nature of
Security.

Bequest as fol-
lows:—"I give
and bequeath
to E. R. all my
property, real
and personal,
except £500 a-
year, which I
give and be-
queath unto
R. H."—*Held*,
following
Stokes v. Heron
(12 Cl. & F.
161, 192), that
R. H. was en-
titled to so
much of testa-
tor's residuary
estate as would
produce £500
a-year in per-
petuity.

Held also,
that R. H. was
entitled to so
much of a sum
of New 3 per
Cents. (part of
the testator's
estate remain-
ing unapplied),
as would pro-
duce the £500
a-year:—since
he had a right
to the best se-
curity to be ob-
tained.

Explanation
of *Evans v.*
Jones (2 Coll.
C. C. 526); and
observations on *Lett v. Randall* (2 D. G. & J. 392, 393).

Costs.—Rule as to costs between parties claiming a trust fund which has been separated from the general residue.

2 D. & J. 269
1479/144 HILL v. RATTEY (alias POTTS).

J. N. POTTS, by his will, in the year 1860, devised as follows:—"I give and bequeath to *Elizabeth Rattey* all my property, real and personal, except £500 a year, which I give and bequeath unto my cousin *Rowley Hill*."

This was the whole of the will.

The bill was filed by *Rowley Hill*, as Plaintiff, against *Elizabeth Rattey* (alias *Potts*), as Defendant, praying the usual decree for administration; and that a sum of Consolidated Bank Annuities, the dividends whereof should be equivalent to £500 a year, might be raised out of the testator's estate, and transferred to the Plaintiff.

Mr. Jessell (in the absence of Sir *Hugh Cairns*, Q. C.) for the Plaintiff:—

According to the true construction of this will, the Plaintiff, *Rowley Hill*, is entitled to £500 a year in perpetuity.

Had the bequest to the Plaintiff stood alone, as a bequest to him of £500 a year, without more, and had there been nothing in the will to lead to a contrary conclusion, then, we admit, he could have claimed no more than an annuity of £500, terminable with his life.

But that is not the case. The testator begins with a bequest to *Elizabeth Rattey*, of "all his property, real and personal, except £500 a year;" and it is the thing so ex-

cepted which he bequeaths to *Rowley Hill*. Now, what the testator gives to *Elizabeth Rattey* is clearly corpus—principal, for the words “all my property, real and personal,” can have no other meaning; and if what is given to *Elizabeth Rattey* be corpus, then that which is excepted from what is so given must be corpus also. The thing excepted must be of the same nature as that from which it is excepted; and if that from which it is excepted is a fee or an absolute interest, then the thing excepted must be a fee or an absolute interest: *Doe dem. Knott v. Lawton* (a), *Davenport v. Coltman* (b), *Hotham v. Sutton* (c), *Marshall v. Hopkins* (d).

1862.
HILL
v.
RATTEY.
—
Argument.

The bequest to the Plaintiff is in effect, therefore, a bequest of so much of the testator's property, real and personal, as will produce £500 a year, as in *Stokes v. Heron* (e), where, upon a direction in a will, “that whatever the testator should die possessed of should produce to his wife an annuity of £100 per annum,” and other annuities to other persons, the House of Lords held the annuities perpetual, upon the ground that they were gifts of property producing the amount of the annuities:—“Gifts of so much property as should produce the income which the testator prescribed as the amount of the gifts that he intended for those individuals:”—Per Lord Cottenham, C., in *Stokes v. Heron* (f).

[He cited also, and commented upon, *Rawlings v. Jennings* (g), *Tweeddale v. Tweeddale* (h), *Yates v. Maddan* (i), *Mansergh v. Campbell* (j), *Potter v. Baker* (k), and *Kerr v. The Middlesex Hospital* (l); and the VICE-CHANCELLOR referred to *Blewitt v. Roberts* (m).]

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| (a) 4 Bing. N. C. 455, 461, 462. | (h) 10 Sim. 453. |
| (b) 12 Sim. 588. | (i) 3 M'N. & G. 532, 540. |
| (c) 15 Ves. 319. | (j) 3 De G. & Jones, 232. |
| (d) 15 East, 309. | (k) 13 Beav. 273; 15 Id. 489. |
| (e) 12 Cl. & F. 161. | (l) 2 D. M. G. 576. |
| (f) 12 Cl. & F. 192, 194. | (m) Cr. & Ph. 274. |
| (g) 13 Ves. 39. | |

1882.
 HILL
 v.
 RATTEY.
 Argument.

Mr. Rolt, Q.C., and Mr. Dickinson, for the Defendant,
Elizabeth Rattey:—

The bequest to the Plaintiff is a bequest of £500 a year, not in perpetuity, but terminable with his life.

The Plaintiff's counsel admit, that, had the bequest to the Plaintiff stood alone as a bequest to him of £500 a year, the annuity would have been terminable with his life; but they contend that it is explained and enlarged by the prior gift to *Elizabeth Rattey*. We, on the contrary, contend that the bequest to *Elizabeth Rattey* being of "all the testator's property, real and personal, except £500, which he gives to *Rowley Hill*," the bequest to *Elizabeth Rattey* can throw no light upon the extent of the bequest to *Rowley Hill*. The Court must first construe the bequest of £500 a year to *Rowley Hill*, as if it had stood alone as an independent bequest. Until the extent of the bequest to *Rowley Hill* has been ascertained, the Court has no means of measuring the bequest to *Elizabeth Rattey*. Until the Court has ascertained the extent of all the specific bequests in a will, how can it measure the extent of the residue? The bequest to *Rowley Hill*, though expressed in the form of an exception, is in effect a specific bequest; and that to *Elizabeth Rattey* is in effect a residuary bequest. *Evans v. Jones* (a) and a large class of similar authorities, show that a bequest to one person of all the testator's property except a specified part of that property, followed by a bequest to another of what has been so excepted, is identical for all intents and purposes with a bequest to the former expressed in terms as a residuary bequest (b). Upon the principle of these decisions, this will should be read as if it had run—"I give and bequeath £500 a year unto my cousin *Rowley Hill*; and all the residue of my property, real and personal,

(a) 2 Coll. C. C. 516, 526.

(b) Id. 526.

I give and bequeath to *Elizabeth Rattey*." The two forms of gift are identical. In both the general bequest is to be measured by ascertaining, first, the extent of the particular bequest.

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The VICE-CHANCELLOR.—Suppose the will had stopped short with the words "except £500 a year ;" or suppose it had run thus: "I give and bequeath to *Elizabeth Rattey* all my property, real and personal, except £500 a year, which I shall dispose of by codicil," how would you then have ascertained the extent of the particular bequest?

Mr. Rolt.—Upon a will so worded we should have had nothing to measure by, unless by a codicil the annuity had been given to some person. Here it is given to the Plaintiff, and the Plaintiff's life is the measure of its duration.

Invert the order of these bequests, and the will runs thus: "I give and bequeath unto my cousin *Rowley Hill* £500 a year ; and, except the said £500 a year, I give and bequeath all my property, real and personal, to *Elizabeth Rattey*." Reading the bequests in that order, the bequest of £500 a year to *Rowley Hill* must be restricted to an annuity terminable with his life.

Doe dem. Knott v. Lawton (a) was decided, not as the Plaintiff's counsel contend, upon any such theory as that the thing excepted must necessarily be of the same quality as that out of which it is excepted, but upon the ground that a contrary construction would have reduced the will in other respects to an absurdity. The words in this will "except £500 a year," carry the case no further than if the testator had said "charged with £500 a year."

In attempting to construe the bequest to the Plaintiff to be a perpetual annuity, the Court will meet with all the diffi-

(a) 4 Bing. N. C. 455.

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 v.
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 —
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culties upon which Lord *Campbell*, C., relied in *Lett v. Randall* (a): for here, as in that case, there is no segregation or appropriation of any part of the testator's property in respect of the annuity. Commenting upon the codicil in *Lett v. Randall*, Lord *Campbell* asks—"And what part of the property were they to segregate and appropriate? Was it to be from the freehold estates or the leasehold estates, or the copyhold estates, or the personalty; and in what proportions? The annuity is charged upon the whole." And again he asks—"If the bequest of the annuity to the children is, as contended, a bequest of the corpus which produces it, what part of the property are they entitled specifically to claim?" (b)

[They cited and commented upon *Savery v. Dyer* (c), *Innes v. Mitchell* (d), *Wilson v. Maddison* (e), *Hedges v. Harper* (f), and *Nichols v. Hawkes* (g).]

Sir *Hugh Cairns*, Q.C., in reply :—

The Court is not at liberty to alter the bequests or invert the order in which the testator has arranged them, but must take them as they stand, and construe them in the order in which they stand. Taking these bequests in the order in which they stand, the £500 a year is excepted out of corpus, and must partake of the same nature.

Judgment reserved.

Feb. 21st.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question to be determined in this case, which was

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| (a) 2 D. G. F. & J. 392, 393. | (e) 2 Y. & Coll. C. C. 372. |
| (b) Id. 393, 394. | (f) 3 De G. & Jones, 129. |
| (c) 1 Amb. 139. | (g) 10 Hare, 342. |
| (d) 9 Ves. 213. | |

most fully and ably argued, turns upon the construction to be put upon a will, the whole of which is contained in these words: "I give and bequeath to *Elizabeth Rattey* all my property, real and personal, except £500 a year, which I give and bequeath unto my cousin *Rowley Hill*."

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The question to be determined is one of frequent occurrence in the construction of wills, viz. whether the £500 a year given to the testator's cousin, the Plaintiff, *Rowley Hill*, is to terminate with the life of the Plaintiff, *Rowley Hill*, or whether it is given him in perpetuity.

The authorities were very fully discussed in *Stokes v. Heron* (a), *Hedges v. Harper* (b), and *Lett v. Randall* (c); and I apprehend that the rule is now well settled, that, where there is a gift by will of a sum certain per annum, without stating whether the gift is to terminate with the life of the donee, or whether it is given him in perpetuity, the question, whether it is for life only or in perpetuity, is a question to be determined upon an examination of the whole will.

If, when the whole will has been examined, nothing is found to lead to the conclusion that the gift was intended to be in perpetuity, the Court presumes that such a gift as I have described, a gift to a person of a sum certain per annum, without more, was intended by the testator to terminate with the life of the donee. But it is clear from the authorities, that, upon such a bequest, the whole will is open, and the whole will must be examined, to ascertain whether it contains anything beyond the simple gift of so much a year; and if it does, whether, what it so contains is sufficient to lead to the conclusion that the gift was intended to be in perpetuity.

(a) 12 Cl. & F. 161.

(b) 3 De G. & Jones, 129.

(c) 3 Sm. & Giff. 83; S. C. af-

firmed on appeal, 2 D. G. F.
& J. 388.

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Now in the case before me the will does contain something beyond the simple gift of the £500 a year to the Plaintiff *Rowley Hill*. The will begins with a bequest to the Defendant *Elizabeth Rattey*, "I give and bequeath to *Elizabeth Rattey* all my property, real and personal, except £500 a year."

It was argued that the bequest to the Defendant *Elizabeth Rattey* cannot raise any inference that the gift of £500 a year to the Plaintiff *Rowley Hill* was intended to be in perpetuity; that the bequest to *Elizabeth Rattey*, being a bequest of all the testator's property except what he has given to *Rowley Hill*, the amount of what the testator has so given to *Rowley Hill* must be determined as if the bequest to him had stood alone, as an independent bequest to him of a sum certain per annum:—"I give and bequeath £500 a year unto my cousin *Rowley Hill*." And the class of cases, of which *Evans v. Jones (a)* may be taken as a type, was relied upon as showing that a general bequest to one person of all the testator's property except a certain part of that property, followed by a bequest to another person of what has been so excepted, is identical, for all intents and purposes, with a bequest to the former expressed in terms as a residuary bequest.

It appears to me, that there is a fallacy in that reasoning.

The case of *Evans v. Jones (a)*, which I have followed upon several occasions (*b*), decided, that, for the purpose of ascertaining who is entitled, in the event of lapse, to a legacy expressed in the form of an exception from a general bequest, the circumstance, that the lapsed legacy is expressed in the form of an exception, is immaterial;

(a) 2 Coll. C. C. 516.

& J. 227, and *Bernard v. Min-*

(b) *Cogswell v. Armstrong*, 2 K. *shull, Johns.* 298, 299.

and that, upon a lapse of the excepted legacy, the general legatee, though in terms the legatee of all except the excepted legacy, would take the whole: the result for this purpose being precisely the same as if the general legacy to him had been a bequest in terms of "all the rest and residue" of the testator's property. But it cannot be inferred from the decision in *Evans v. Jones*, that the circumstance of a particular bequest being given in the form of an exception from an antecedent general bequest, is in all cases and for all purposes immaterial. In a case like the present, where the question is, what amount of property was intended by the testator to pass by the bequest which he has expressed in the form of an excepted legacy, the circumstance that he has expressed it in the form of an exception, and not in that of an independent bequest, appears to me to be most material. The cases I have referred to—*Stokes v. Heron*, and *Hedges v. Harper*—show that the question, what amount of property was intended by the testator to pass by a bequest of a sum certain per annum, is one to be determined upon an examination of the whole of his will. The Court is not to take it for granted that such a bequest is merely an annuity for life, without looking to the rest of the will, to ascertain whether upon the whole of the will the annuity was not intended to be in perpetuity.

In examining the whole of the will in the case before me, I find the bequest of the £500 a year to *Rowley Hill* preceded by a bequest of all the testator's property, real and personal, to *Elizabeth Rattey*, and excepted out of that preceding bequest. The testator begins with the bequest to *Elizabeth Rattey*, and then comes to the bequest to *Rowley Hill*. He first bequeaths to *Elizabeth Rattey* "all his property, real and personal, except £500 a year," and then bequeaths to *Rowley Hill* what he has so excepted. It appears to me that the proper order for the

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interpretation of these bequests is the order in which they are made by the testator—and that I must first ascertain what it is that he has given to *Elizabeth Rattey* by the words “all my property, real and personal, except £500 a year,” before I shall be in a position to determine what it is that he has given to his cousin *Rowley Hill*. Now it was admitted on the part of the Defendant, and indeed it could not have been disputed, that, if the will had stopped short with the words “£500 a year”—if it had run thus “I give and bequeath to *Elizabeth Rattey* all my property, real and personal, except £500 a year”—the interpretation must have been “except so much of my property, real and personal, as will produce £500 a year.” The excepted bequest must have been presumed to be of the same nature as the general bequest from which it is excepted; and the general bequest being corpus—“all my property, real and personal, except £500 a year,” the excepted bequest must have been presumed to be corpus also. Had the will stopped with the words “except £500 a year,” the operation of the exception would have been to take out of the operation of the preceding general bequest of “all my property, real and personal,” such an amount of that property as would have been required to produce £500 a year, and to take out that amount in its entirety.

If, having taken out that amount in its entirety, the testator had gone on to give what he had so taken out to *Rowley Hill* “for life,” or disposed of it in any other way for a limited period only, then the operation of the previous bequest to *Elizabeth Rattey* would have been proportionally enlarged; but here there is no such limitation: what in its entirety he has taken out of the previous bequest the testator gives to *Rowley Hill*—not “for life” or any other limited period—but absolutely. And in the absence of any words of restriction *Rowley Hill* must take what has been so excepted absolutely.

In support of this view I find an authority directly in point in a case relied on by the Plaintiff's counsel—the case of *Doe dem. Knott v. Lawton* (a). There, by a will before the recent Act, the testator bequeathed to his sons thus:—"I give and bequeath to my sons my estate that I now occupy, except the house I now occupy, with the cottages thereon, which I give to my daughters:" and the Court of Common Pleas being of opinion that the gift to the sons carried the fee, held it to be a necessary consequence that the gift to the daughters must carry a fee also. If the devise to the sons carried the fee, the exception out of that devise "must by necessary intendment carry the same quantity of estate as that from which it was excepted" (b).

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It was ingeniously argued, that, by simply inverting the order of the bequests, the will would run thus: "I give and bequeath unto my cousin *Rowley Hill* £500 a year; and except that £500 a year, I give and bequeath all my property, real and personal, to *Elizabeth Rattey*;" that, reading the bequests in that order, the bequest of £500 a year to *Rowley Hill* must be restricted to an annuity terminable with his life; and that a mere alteration in the order of arrangement ought not to be allowed to enlarge what would have been an annuity for life into a perpetual annuity.

But that argument is not sound. Even assuming, that, upon a will in the form supposed, in which the order of the bequest should be inverted, the bequest of £500 a year to *Rowley Hill* would have been restricted to an annuity terminable with his life—a question upon which it is not necessary for me to express an opinion—it appears to me, that the Court is not at liberty to try the case as if the order of the bequests had been inverted. The testator has thought fit to put the general bequest to *Elizabeth Rattey* first. The logical order in which the Court should construe

(a) 4 Bing. N. C. 455.

(b) Per *Tindal*, C.J., Id. 462.

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the two bequests is the order in which they presented themselves to the mind of the testator; and the very circumstance of his having worded the will in its present form, is a reason for first construing the general bequest to *Elizabeth Ratley*, and then ascertaining the measure of the bequest to *Rowley Hill*.

It was argued, that, in construing the bequest to *Rowley Hill* to be a bequest of so much as will produce £500 a year in perpetuity, the Court will encounter the difficulty upon which Lord *Campbell* relied, in holding the annuities in *Lett v. Randall* (a) to be terminable; that, as there is not in the will any segregation or appropriation of any part of the testator's property in respect of the annuity, it is impossible to ascertain what part of the property should be so segregated and appropriated, whether freehold estates or personalty; and that, if the bequest of the annuity is a bequest of the corpus which produces it, the Court has no means of determining what part of the property *Rowley Hill* is entitled specifically to claim.

But precisely the same difficulty occurred in *Stokes v. Heron* (b), where the bequest was equally silent as to segregation and appropriation. The testator's will was, "that whatever he died possessed of, or in any way entitled to, should produce to his wife an annuity of £100 per annum," and to the other annuitants other like annuities. The House of Lords surmounted the difficulty by ordering "that a sufficient portion of the testator's personal estate be allocated and set apart by the Master as a fund for the payment of the annuities." And I apprehend, that, if the Court once infers from a will, that the testator intended to give a sum certain per annum in perpetuity, the absence of any direction as to the particular part of the testator's

(a) 2 D. G. F. & J. 392, 393.

(b) 12 Cl. & F. 161.

property to be segregated or appropriated to meet it, is immaterial; and that, as in *Stokes v. Heron*, the Court will take care that a sufficient part of the testator's property be set apart for that purpose.

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I have not dwelt upon the circumstance, that the testator does not in terms describe what he gives to *Rowley Hill* as "an annuity," but as "£500 a year" (a). In deciding in the Plaintiff's favour, I do not rely upon that circumstance, although I feel that it would have assisted the Defendant's case, if the testator had described the gift to the Plaintiff in terms as "an annuity." The principle upon which I rely is that upon which the House of Lords determined the case of *Stokes v. Heron*, that the bequest to the annuitant is a bequest of "property producing the amount of the annuity" (b). The bequest to *Elizabeth Rattey* being a bequest of all the testator's property except what produces £500 a year, the bequest to *Rowley Hill* is of so much of the testator's property as produces that sum.

There will be a declaration, that the Plaintiff is entitled to so much of the testator's residuary estate as will produce £500 a year; and the order will then follow that in *Stokes v. Heron*—Let so much of the testator's real estate as will produce £500 a year be ascertained, and (if the parties differ) by the Judge in Chambers, and let the same be conveyed or transferred to the Plaintiff.

(a) "In some cases perhaps there may be a distinction between the gift of a certain sum per annum, and the gift of an annuity; the term 'annuity' having by usage acquired somewhat more of relation to an interest limited by the duration of life, than the term 'a sum certain per annum' has acquired:" per *Turner, L. J.*, in *Hedges v. Harper*, 3 De Gex & Jones, 134.
(b) Per Lord *Cottenham, C.*, *Stokes v. Heron*, 12 Cl. & F. 192.

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Sir *H. Cairns*, Q. C.—There is already a sum of Bank New 3 per cent. Annuities, part of the testator's estate, remaining unapplied; and we have ascertained that the amount of such Bank Annuities required to produce £500 a year is £16,666 : 13 : 4.

Mr. *Rolt*, Q. C., objected, that the Plaintiff was not entitled to such a sum as would produce £500 a year at so low a rate of interest as 3*l.* per cent.

The VICE-CHANCELLOR.—The Plaintiff is entitled to the best security to be obtained; and if there is such a sum of Bank New 3 per cent. Annuities as his counsel represents, he is entitled to it.

The decree will therefore be in this form:—

Minute of
 Decree.

DECLARE, that, according to the true construction of the will of the testator *J. N. Potts*, the Plaintiff is entitled to so much of the residuary estate as will produce £500 a year, from the expiration of the first year after the testator's death. And it appearing that there is a sufficient sum of Bank New 3 per cent. Annuities, part of the testator's residuary estate, remaining unapplied, and the Court being of opinion that it is proper that the same should be applied towards making good the said bequest to the Plaintiff—Let the sum of £ (a), Bank New 3 per cent. Annuities, producing an annual income of £ (a) be transferred to the Plaintiff.

A discussion then arose as to costs.

Mr. *Rolt*, Q. C., for the Defendant, contended that the costs should come out of the £16,666 : 13 : 4, which had been set apart to meet the £500 a year, and not out of the testator's general estate.

Where a question arises as to the interest of parties in a trust fund which has been separated from the general

(a) Left in blank in the proper amounts, after deducting
 Minutes, to be filled up with the Legacy Duty and Income Tax.

residue, the costs must come out of the particular fund : *Jenour v. Jenour* (a). There the costs having been given by the decree, as specifically prayed, out of the general personal estate, the decree on appeal was corrected in that particular.

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The VICE-CHANCELLOR.—It seems to me, upon every ground, that these costs should be borne by the residuary estate.

The suit is an administration suit. The Defendant has the entire beneficial interest in the residuary estate. It is really a contest between the Plaintiff and the Defendant, and the Plaintiff has succeeded. The successful party should have his costs.

WRIGHT v. WRIGHT.

THE Plaintiff's father, by his will, bequeathed to her a sum of stock in the public funds, upon trust for her separate use, without power of anticipation.

Another sum of like stock was bequeathed to the Plaintiff, upon like trusts, by the will of her mother.

Both bequests were expressed to be made to the Plaintiff simpliciter, and without the intervention of any trustee.

After the decease of her parents, the Plaintiff, having attained the age of twenty-four, and being still a spinster, called for and obtained a transfer of the stock into her own name.

Subsequently, being still a spinster, she caused the stock to be sold out, spent a portion of the proceeds, and invested the rest, as to part in purchasing in her own name shares

Feb. 12th.
*Husband and
Wife—Trust
for separate
Use—Single
Woman—Con-
version of Fund
by—Trust de-
termined.*

Where personal property was bequeathed to a woman upon trust for her separate use, but without the intervention of any trustee, and she afterwards, being discontinue and sui juris, sold the stock, spent a portion of the proceeds, and invested the rest in shares of a Joint Stock Bank and Canada bonds: Held, that by so doing she had determined the trust for her separate use.

(a) 10 Ves. 562.

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in the *London & Westminster Bank*, and as to the residue in the purchase of *Canada* bonds.

Some time after these investments had been made, the Plaintiff married.

At the hearing, it appeared that during the coverture, in a transaction which the bill sought to set aside as against one of the Defendants, named *Charlotte Wright*, the Plaintiff's husband (since deceased) had represented the Bank shares and *Canada* bonds as his own property, by virtue of his marital right.

One of the questions raised at the hearing was, whether, under the circumstances of the case, this representation was correct in point of law.

Argument.

Mr. Rolt, Q.C., and Mr. C. T. Swanston, jun., for the Plaintiff:—

At the date of the Plaintiff's marriage, the Bank shares and *Canada* bonds were her separate estate; and her husband, by representing them as his own property by virtue of his marital right, made a representation incorrect in point of law.

The Bank shares and *Canada* bonds were purchased with a portion of the proceeds arising from the sale of stock which had been bequeathed to the Plaintiff by her parents, upon trust for her separate use, without power of anticipation.

Had the property, the subject of the bequest, remained till the Plaintiff's marriage in the form in which it was originally bequeathed, it could not have been questioned that her husband, by representing it during the coverture as his own, would have made a representation incorrect in

point of law. The case of *Newlands v. Paynter* (a) shows, that, by marrying a woman having property so circumstanced, the husband must be considered in this Court as adopting the property in the state in which he finds it, and is bound in equity not to disturb it (b). The circumstance of the property being found by the intended husband standing in the name of the intended wife without the intervention of any trustee, is immaterial, and cannot afterwards be alleged by the husband as a reason for supposing it to have been his wife's absolute property. In marrying a woman having property standing in her own name,—or, in fact, possessed of property of any description, whether choses in action or mere personal chattels, the husband must be taken to have been cognisant (if the facts were so), that, by the instrument under which his wife became entitled to such property, it was impressed with a trust for her separate use, and she was restrained from anticipating it: *Newlands v. Paynter* (c). That case and *Tullett v. Armstrong* (d) show, that the question, whether in fact the husband was cognisant of the existence of such a trust, is immaterial. In this Court he must be taken to have been cognisant of it.

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Then, if such would have been the position of the husband with regard to the property in question, in case it had remained till the marriage in the form in which it was originally bequeathed, the circumstance of its having been since sold out and invested in Bank shares and *Canada* bonds, could not alter that position. Had there been any difficulty in tracing the property, it might have been otherwise; but here there is no doubt that the proceeds of the sale of the stock were, to the extent for which we contend, invested in the purchase

(a) 4 My. & Cr. 408.
(b) Id. 417.

(c) Ibid.
(d) Id. 377.

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of the Bank shares and bonds. The transaction amounted to no more than an ordinary varying of the security on which the trust fund was invested; and if the trust attached to it in its original form as stock, it attached to it no less in the form in which it was reinvested.

Had trustees been interposed—had the stock been bequeathed, not to the Plaintiff upon trust for her separate use, but to third persons as trustees for the Plaintiff, and had the stock been sold out, and the proceeds invested in these same Bank shares and bonds by such third persons as trustees for the Plaintiff, no one would have attempted to dispute that the trust attached to the Bank shares and bonds as it had previously attached to the stock; and the circumstance, that in this case the Plaintiff was her own trustee—that her parents omitted to interpose a trustee for her protection—will not in this Court be allowed to defeat the trust.

For these reasons, we submit, that at the date of the marriage the Bank shares and bonds in question were the separate estate of the Plaintiff; and that, by subsequently representing them as his own by virtue of his marital right, her husband made a misrepresentation.

Mr. *Daniel*, Q.C., and Mr. *Swinburne*, for the Defendant *Charlotte Wright*, contended that the representation made by the Plaintiff's husband was correct.

Before her marriage, the Plaintiff, being of age and sui juris, sold out the stock to which the trust for her separate use attached, and received the purchase-money. By so doing she extinguished the trust for her separate use. The property to which that trust attached was disposed of and at an end; and if in this case the Court were to allow it to be traced into Bank shares and *Canada* bonds, in other cases attempts would be made to trace property originally

affected with a similar trust into every imaginable description of personal chattels.

At the date of the marriage the Bank shares and bonds in question were the absolute property of the Plaintiff, and her husband was entitled during the coverture to represent them as his own by virtue of his marital right.

Mr. *Rolt*, Q.C., replied.

Mr. *Willcock*, Q.C., and Mr. *Terrell*, appeared for the Defendant *H. G. Robinson*, the executor of the Plaintiff's late husband.

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Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Some of the propositions for which the Plaintiff's counsel contended in the course of the argument in this case were of so wide a nature, that, if they could be supported, the consequences would be serious to all persons entering into a contract of marriage.

Judgment.

The facts of the case are these :—

At the age of twenty-four years the Plaintiff was entitled to various sums of Government stock, which had been bequeathed to her by the respective wills of her father and mother, upon trust for her separate use, without power of anticipation. Being then unmarried, she was entitled to obtain, and did obtain, possession of these sums of stock, causing them to be transferred into her own name. Subsequently, being still unmarried, she caused them to be sold out, spent a portion of the proceeds, and invested the rest, as to part in purchasing in her own name shares in the *London & Westminster Bank*, and as to the residue in

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the purchase of *Canada* bonds. Some time after these investments had been made she married.

The question to be determined is, whether the trust for her separate use, and the restraint on anticipation imposed by the Plaintiff's parents on the sums of stock, attached also to the Bank shares and *Canada* bonds which she thus purchased out of the proceeds of the sale of the stock; or whether, by the sale of the stock and the purchase of the shares and bonds, the trust for her separate use and the restraint on anticipation were finally determined.

The case of *Newlands v. Paynter* (a), which was relied upon as an authority to show that the trust in question still attached to the property, was a strong decision, establishing, as it seems to do, that a person marrying a woman having property standing in her own name without the intervention of any trustee, or indeed a woman being possessed of property of any description, no matter whether it be a chose in action or a mere personal chattel, must be taken to have been cognisant, if the fact were so, that, by the instrument under which she became entitled to such property, it was impressed with a trust for her separate use, and she was restrained from anticipating it.

That was a strong decision, and the inferences to be drawn from it are sufficiently serious. Lord *Cottenham*, in deciding the case, followed the principle which he had himself established a few days previously in the case of *Tullett v. Armstrong* (b), where he investigates very fully the principles to which the doctrine for the protection of the wife's separate estate had been referred, and states his own conclusion as to the only ground upon which it can be satisfactorily supported. He says, "I have over and over again considered this subject, with a great anxiety

(a) 4 My. & Cr. 408.

(b) Id. 390.

to find some principle of property, consistent with the existent decisions, upon which the preservation of the separate estate during a subsequent coverture could be supported. I have been anxious to find means of preserving it, not only to maintain those existing arrangements which have proceeded upon the ground of its validity, but because I think it desirable that the rule should, if possible, be established for the future, believing, as I do, that when a marriage takes place, the wife having property settled to her separate use, all the parties in general suppose that it will so continue during the coverture. To permit the husband, therefore, to break through such a settlement, and himself to receive the fund, would, in general, be contrary to the intention of the parties, and unjust towards the wife. This view of the case has led to a suggestion which has often been made in argument, by which the object might be attained without violating any rule of property, namely, by supposing the husband, marrying a woman with a property so settled, tacitly to assent to such settlement, or at least to be bound by an equity not to dispute it. I was for some time much disposed to adopt this view of the subject; and in all cases in which the husband was cognisant of the fact, there would be much of equitable principle to support the gift or settlement against him; but putting the title of the wife upon such assent of the husband, assumes that, but for such assent, it would not exist. It abandons the idea of the old separate estate continuing through the subsequent coverture, and supposes a new separate estate to arise from the act of the husband. If the title of the wife were to rest upon that supposition, I fear that the remedy would be very inadequate, and that questions would constantly arise as to how far the circumstances of each case would afford evidence of assent, or raise this equity against the husband "(a).

(a) Per Lord Cottenham, C., in *Tullett v. Armstrong*, 4 My. & Cr. 404, 405.

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The conclusion, therefore, at which Lord *Cottenham* arrives, is that the doctrine cannot be satisfactorily based upon any supposed assent on the part of the husband, and that the husband is bound by the trust for his wife's separate use, whether he did or did not assent to it—whether he was or was not cognisant of its existence. And the result would seem to be (and it is a result sufficiently serious to persons entering into the marriage contract), that, if a man contracts to marry a woman having £20,000 of stock standing in her own name, he is bound to take notice (if such be the fact) that she acquired it under some instrument by which it was impressed with a trust for her separate use; that he must in this Court be taken to have had such notice, whether in fact he knew of the existence of such a trust or not; and that, if he marries without inquiry as to how the property was circumstanced, he must be considered as adopting the property in the state in which he found it, and is bound in equity not to disturb it.

But the authorities relied on fall far short of the case before me; for here the Plaintiff before the marriage, and at a time when she was *sui juris*, destroyed that property which had been impressed with the trusts for her separate use. Being *sui juris*, and absolute mistress of the stock bequeathed to her, she sold out the stock, spent part of the money arising from the sale, and with the residue bought property totally inconsistent with the principles which govern all ordinary investments of trust-money—shares in a banking company, as to which I have no evidence whether it is incorporated, and *Canada* bonds. Had she allowed the property to remain in *statu quo*—had she left it until her marriage in the form of investment in which it was bequeathed to her by her parents, then, according to *Newlands v. Paynter*, the husband must have been considered as adopting the property in the state in which they left it, and subject to the trusts which while in

that state they had impressed upon it. But she did not leave it in that form: having the sole ownership of the property, and, being single and sui juris, she sold it and received the purchase-money. When the property was in her hands as money, it was absolutely hers, as if it had never been fettered by any trust whatever. By selling the property, she disposed of it finally and entirely.

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Had the original bequests been made to trustees, in trust for the Plaintiff for her separate use, and had she, being discoverte, called upon the trustees to sell the stock, and received from them the proceeds of the sale, no question could have arisen that the trust was at an end; and the circumstance that she was herself the trustee cannot affect the question.

A contrary decision would lead to the absurd consequence, that a person about to marry a lady with a handsomely furnished house, would be bound to inquire into the history of every article of furniture, and of the money with which every table and chair was purchased; and if it should turn out that any article of furniture had been purchased with money produced, however remotely, by the sale of property originally impressed with a trust for the lady's separate use, he must, in the event of his marrying her, be considered in this Court as adopting it in that state, and bound in equity not to disturb it.

Cases are conceivable in which it would be quite as possible to trace the proceeds arising from the sale of property originally impressed with a trust of this description into tables and chairs, as it is in the case before me to trace the proceeds of the stock into shares or bonds; but the mere circumstance of its being possible to trace the proceeds of the sale, cannot enable this Court, in a case like the present, where once the cestui que trust, being discoverte and sui juris, has converted the property from its original form,

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and has dealt with it as absolute owner, to treat the property into which the proceeds of the sale can be so traced, as still subject to a trust for her separate use.

It appears to me, therefore, that the Plaintiff's contention fails, and that her husband was at liberty, during the coverture, to treat the Bank shares and *Canada* bonds as his own absolute property, by virtue of his marital right.

[Upon this and other grounds the bill was dismissed, with costs as against the Defendant *Charlotte Wright*.]

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Nov. 23rd:
Dec. 14th &
20th..

Will—Con-
struction—
“Before-men-
tioned pecuniary
Legatees”—
Residuary Be-
quest to—
Whether a Be-
quest to a Class
—Codicil—
Substituted
pecuniary
Legacy—
Effect of, on
Share of
Residue.

Testator by his will bequeathed several sums of money to several pecuniary legatees by name, including one of £500 to his sister, and bequeathed the residue of his personal estate “unto all the before-mentioned pecuniary legatees” (with certain exceptions) “to be divided among them in proportion to their respective pecuniary legacies:”—*Held*, that the residue was not given to the pecuniary legatees as a class; and that the testator's sister having died in his lifetime, the surviving pecuniary legatees were not entitled to her share.

By a codicil the testator, after reciting his sister's death, bequeathed the sum of £500 to a trustee for her children, but was silent as to the residue:—*Held*, that neither *Lord Carrington v. Payne* (5 Ves. 404), nor *Johnstone v. The Earl of Harrowby* (1 D. G. F. & J. 183), entitled the children to their mother's share of the residue, and that there was an intestacy as to that share.

7 Jan. 11. 59th ——— 8cl. D. 560.
IN RE GIBSON'S TRUSTS.

GEORGE GIBSON, by his will dated the 1st of July, 1853, bequeathed several pecuniary legacies to certain persons in his will named, and amongst others a sum of £500 to his sister *Mary Birkett*, since deceased. He also bequeathed to each of his servants who should be in his service at the time of his decease the sum of £50, and to each of his executors the sum of £100, as a mark of his esteem; and he bequeathed to *Thomas Pearson* the sum of £200, upon trust to invest and apply the interest as in his will mentioned for the benefit of *Joseph Pearson*; and he declared, that if the said *Joseph Pearson* should die before the investment of the said sum of £200, or if at his decease any portion of the said trust premises, whether principal or income, should remain in the hands of the said *Thomas*

Pearson unapplied to the purposes of the said trust, then he gave the uninvested or unapplied money unto the said *Mary Birkett*, her executors and administrators.

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RE GIBSON.
Statement.

The will then proceeded as follows:—"And all the residue of my personal estate whatsoever I give and bequeath unto all the before-mentioned pecuniary legatees (except my servants and executors, and the said *Thomas Pearson* as trustee for the said *Joseph Pearson*), and to be divided among them in proportion to their respective pecuniary legacies."

Mary Birkett having died since the date of his will, the testator in the year 1854 made the following codicil to his will:—"Whereas, since the date and execution of my said will, *Mary Birkett* therein named has departed this life, now I do by this codicil to my said will give and bequeath the sum of £500, and also the whole or such part of the sum of £200 directed by my said will to be invested for the benefit of *Joseph Pearson*, as shall not under the provisions of my said will have been applied for the benefit of the said *Joseph Pearson*, unto *John Birkett* in my said will named, his executors and administrators, in trust to pay the same unto such of the children of the said *Mary Birkett* as shall attain the age of twenty-one years, when and as they shall severally attain that age, and if more than one in equal shares; and I do direct that the interest and annual income arising from the respective shares of such children during their respective minorities shall be paid and applied for their respective maintenance and education; and if their father be living, I direct that his receipts shall be good discharges to the said *John Birkett*, his executors or administrators, for such interest and dividends."

The testator died in 1859.

The executors paid the several pecuniary legacies bequeathed by the will and codicil, including the £500 by

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the codicil bequeathed to *John Birkett*, upon trust for the children of *Mary Birkett*: and as to these no question arose.

They then proceeded to apportion the residue of the testator's personal estate amongst the several legatees named in the will and *John Birkett*, apportioning to the latter, in respect of the legacy of £500 bequeathed to him by the codicil, a sum of £365 17s. 1d.

The right of *John Birkett* to any share in the residue being disputed, the executors paid this sum (after deducting their costs) into court under the Act for the Relief of Trustees, "in trust in the matter of the share of the residuary personalty apportioned in respect of the legacy of £500 bequeathed by the codicil of *George Gibson*."

A petition was now presented by five of the pecuniary legatees under the will (other than the executors and servants of the testator and *Thomas Pearson*), praying that the fund in court might be paid to them and the other surviving pecuniary legatees (except those lastly excepted), to be divided amongst them in proportion to the amounts of their respective pecuniary legacies.

Three of the testator's next of kin were served with the petition, but did not think fit to appear by counsel.

Argument.

Mr. *Lawson*, for the petitioners:—

According to the true construction of the will and codicil, and in the events which have happened, the petitioners with the other surviving pecuniary legatees named in the will (except the testator's executors and servants, and *Thomas Pearson*,) are entitled to the share of the testator's residuary personal estate apportioned to *John Birkett* in respect of the legacy of £500, and now represented by the fund in court.

The residuary bequest is not made to the pecuniary

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legatees individually or nominatim, but as a class. The words are, "The before-mentioned pecuniary legatees;" and *Nicholson v. Patrickson* (a) is a clear authority to show, that, under a residuary bequest so worded, if one of the pecuniary legatees dies in the lifetime of the testator, the survivors take the whole. There, as here, after several pecuniary legacies, the testatrix bequeathed her residuary personal estate thus : "Unto and equally amongst all those of my *legatees hereinbefore named* whose legacies do not exceed the sum of £200." Some of the legatees died in the lifetime of the testatrix; and Vice-Chancellor *Stuart* held, that the legacies which would have belonged to those legatees, had they survived the testatrix, formed part of the residue, and did not lapse for the benefit of the next of kin (b). A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others. In a gift to a class, you look to the description, and inquire what individuals answer to it; and those who do answer to it are the legatees described :—Per Lord *Cottenham*, C., in *Barber v. Barber* (c).

THE VICE-CHANCELLOR.—The strongest case I remember in your favour is *Knight v. Gould* (d). There the gift was of the residue "to my executors hereinafter named, to pay my debts, legacies, and testamentary charges, and also to recompense them for their trouble, equally between them;" and three persons were then named executors, one of whom died in the testator's lifetime; and Sir *John Leach* first, and Lord *Brougham* upon appeal, held, that the two survivors were entitled to the whole. But the decision in that case turned upon the fact that the intention of the bequest was expressly "to recompense the executors for their care and trouble;" from which Lord *Brougham* inferred, that, notwithstanding the words "hereinafter named," the legacy was intended for them as a class (e).

(a) 7 Jur. N. S. 987.

(b) Id. 989.

(c) 3 My. & Cr. 697.

(d) 2 My. & K. 295.

(e) Commenting upon Lord *Brougham's* decision in *Knight v.*

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Mr. *Lawson*.—If, in *Knight v. Gould*, the decision turned upon the circumstance of the bequest being to executors, to recompense them for their trouble, it was not so in *Nicholson v. Patrickson*. That case is conclusive, that there has been no lapse.

The VICE-CHANCELLOR.—There the pecuniary bequest were to the testator's first cousins, as a class. The residuary bequest, therefore, was likewise to a class. Under a gift to a class, of course, there cannot be a lapse.

Mr. *Lawson*.—Here also the form of the residuary bequest is such that the residuary legatees take as a class: *Sanders v. Ashford* (a). There the devise was to five persons *nominatim*, to be equally divided between them if more than one. One of the devisees died during the testator's lifetime, and the Master of the Rolls held that there had been no lapse, but that the four survivors took equally.

These cases are conclusive against the claim of the next of kin.

As regards *John Birkett* and those for whom he is trustee, they cannot pretend to be entitled except under the codicil. Now the codicil, although it expressly gives to *John Birkett* what *Mary Birkett* (if living) would have taken under the pecuniary bequest, is wholly silent as to the residuary bequest in her favour. And it is a broad rule

Gould, Lord *Cottenham* says—“Lord *Brougham* relied upon two grounds principally:—first, that the persons to take were those who were to perform the duties, and the survivors were such persons; secondly, that the gift was to the executors as a class in terms; for the words ‘hereinafter named’ were mere surplussage, inasmuch as the result

would have been the same if they had been omitted, it being absolutely necessary to name them in order to appoint them. In that case the gift was to executors described as such; in this, it is to individuals, particularly named and described:”—Per Lord *Cottenham*, C., in *Barber v. Barber*, 3 My. & C. 698.

(a) 28 Beav. 609.

in construing codicils, that the dispositions of the will are not to be disturbed any further than may be necessary, in order to give effect to the codicil: 1 *Jarman* on Wills (a).

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[He cited also *Harris v. Davis* (b).]

Mr. *Kay*, for *John Birkett* as trustee for the children of *Mary Birkett*, was stopped by the Court.

The VICE-CHANCELLOR.—I am clear that the claim of the petitioners cannot be sustained. But as regards the claim of *John Birkett* and those for whom he is a trustee, I think there is a serious question to be argued between them and the next of kin; and the next of kin are not represented.

Mr. *Kay* proceeded to contend that the next of kin were not entitled (c).

Mr. *Colt* appeared for the executors who had paid the fund into court.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

So far as regards the petitioners, I have no doubt upon this case. The claim raised by the petitioners cannot be supported.

*Judgment
on the first
Hearing.*

The bequest of the residue is in these words:—"To all the *before-mentioned* pecuniary legatees (except my servants and executors, and the said *Thomas Pearson* as trustee for *Joseph Pearson*), and to be divided between them in proportion to their respective pecuniary legacies." The testator actually excepts certain of those to whom he

(a) Ed. 2, p. 146.

(b) 1 Coll. C. C. 416.

(c) His arguments are stated in the report of the adjourned

hearing, when the next of kin were represented by counsel, *infra*, p. 663.

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 Judgment.

had given pecuniary legacies; and the inference clearly is, that he intends to give this additional legacy to the rest, not as members of a class but as individuals. The effect is precisely the same as it would have been, if the testator, in giving the additional legacy, had repeated all their names at length. Had he so repeated the name of *Mary Birkett*, the petitioners could have had no more right to her share of the residue than they have to her pecuniary legacy.

In all the cases cited which I need notice, the gifts which the Court held not to have lapsed were gifts to a class. And where a gift is to a class, lapse is impossible, the requisite of surviving the testator being involved in the very description of the objects as a class. This is as old as *Viner v. Francis* (a), and a great deal older.

In *Knight v. Gould* (b), the gift was to the executors as a class. I was junior counsel in that case for the surviving executors, and I remember that the only difficulty I felt in arguing that it was a gift to a class, arose from the words "to my executors hereinafter *named*." I felt that difficulty; but we contended that the testatrix must have intended to give to the executors as a class and not as individuals, because she expressed it to be to recompense them for their trouble in executing their office; and that whoever performed that office must have been intended to have the recompense, which was not a share of the residue but the residue itself. And it was upon these grounds that Lord *Brougham* held there had been no lapse. He says, "The testatrix has been her own expounder; the writer is the commentator, and can best declare the meaning of the words employed in her own act. She expressly states why the gift is made of the beneficial interest; it is as a reward for performing an office. The office is joint, so, naturally, is the reward. The burthen

(a) 2 Cox, 190.

(b) 2 M. & K. 295.

is cast upon them jointly; it must naturally be presumed that the benefit is intended to be joint also."

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R^e GIBSON.
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With the exception of *Knight v. Gould*, I know of no case where a bequest to persons referred to in the will by the terms "hereinbefore named," or "hereinafter named," or by the words "hereinbefore mentioned," or "hereinafter mentioned," has been held to be a bequest to those persons as a class.

For these reasons I am clear that the petitioners are not entitled.

Upon the question raised by *John Birkett*, I shall direct the petition to stand over for the next of kin to be ascertained. When ascertained, I wish them to appear, and to be heard by counsel.

The petition having stood over accordingly, and the next of kin having been ascertained, Mr. *Cotton* now appeared to argue on their behalf.

Dec. 14th.
Argument resumed.

Mr. *Kay*, for *John Birkett* :—

Upon the true construction of the will and codicil, *John Birkett*, as trustee for the children of *Mary Birkett*, is entitled not only to the legacy of £500, and the interest by the codicil bequeathed to him in the £200, but also to a share of the testator's residuary personalty in proportion to the amount of that legacy and interest.

Where a testator, who, by his will has given pecuniary legacies to certain pecuniary legatees, and has directed his residuary personalty to go to the same persons, afterwards makes a codicil revoking one of the pecuniary legacies, and bequeathing it to another, but saying nothing as to the residuary personalty, the new legatee is entitled not only to the pecuniary legacy given him by the codicil, but also to the same share of the residue to which he would have

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been entitled if his name had been substituted in the will for that of the legatee whose legacy has been revoked.

That this is so where the revoked gift, instead of being a pecuniary legacy, is a devise of land, is clear from the case of *Lord Carrington v. Payne* (a); and the rule must be the same whether the subject matter of the original devise be land as in *Lord Carrington v. Payne*, or a sum of money as in the present case. By the will in *Lord Carrington v. Payne*, the testator devised lands to certain uses, and bequeathed his residuary personal estate to be laid out in the purchase of other lands to be settled to the same uses;—the words of the will being “to such uses, upon such trusts, and in such and the like manner as I have *hereinbefore* directed respecting my real estates.” Afterwards, by a codicil, he revoked the devise of the first-mentioned lands, and devised them afresh to a new devisee; but the codicil was silent as to the residuary personalty: nevertheless, Lord *Alvanley* held the devisee under the codicil entitled not only to the lands devised by the will, but also to the residuary personalty. There the residuary personalty was claimed by the devisee under the will, and upon the authority of *Lord Sidney Beauclerk v. Mead* (b), and *Darley v. Langworthy* (c), it was argued on his behalf, as it will be argued here, that, the codicil having been silent as to the residuary personalty, the testator must be taken to have intended his residuary personalty to go exactly as if the codicil had not been executed. But it was held that the effect of the codicil was precisely the same as if the testator with his own hand had inserted in the will the name of the new devisee, and then republished the will:—Per Lord *Alvanley* in *Lord Carrington v. Payne* (d). So here the effect is precisely the same as if the testator with his own hand had inserted in the will the name of *John Birkett*

(a) 5 Ves. 404.

(b) 2 Atk. 167.

(c) 7 Bro. P. C. 177.

(d) 5 Ves. 422.

instead of the name of *Mary Birkett*, in which case *John Birkett* would have been one of "the before-mentioned pecuniary legatees." The effect of the codicil is to substitute "*John*" for "*Mary*" throughout the will.

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Again, the case of *Johnstone v. The Earl of Harrowby* (a), and a long list of authorities there cited, establish that substituted legacies are subject to the same conditions and carry with them the same incidents as those for which they are substituted. Here the original legacy to *Mary Birkett* carried with it the incident of a share in the reversion. The substituted legacy, therefore, to *John Birkett* will carry with it a right to that share.

And even if authority were wanting upon the point, it must clearly have been the intention of the testator that whatever *Mary Birkett* would have taken under the will, she having died since the will was executed, should pass by the effect of the codicil to *John Birkett*, as trustee for her children.

The next of kin will call upon the Court to hold that the testator died intestate. But it has always been the rule of this Court to presume that every testator intended not to die intestate: the mere fact of his making a will being a proof that he intended to dispose of his property.

Mr. Cotton, for the next of kin :—

Mary Birkett having died in the lifetime of the testator, the bequest to her of a share of the testator's residuary personal estate lapsed; and the codicil being altogether silent as to the residuary personalty, the testator died intestate as to the share by his will bequeathed to *Mary Birkett*.

The rule of construction attempted to be deduced from the case of *Lord Carrington v. Payne* is not authorised

(a) 1 D. G. F. & J. 183.

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by that decision, which was based on the special circumstances of the case before Lord *Alvanley*. The devise revoked by the codicil was a devise of land; the residuary bequest was of personalty, to be laid out in the purchase of land: the whole scheme of the will, in Lord *Alvanley's* view, was to unite both species of land in the same trustees for the benefit of the same series of devisees in strict settlement. And Lord *Alvanley* held, that the codicil made no alteration with regard to that union:—Although the testator made use of the word “revoke,” the codicil was not a revocation as to the union of the two species of land, but merely an alteration of the order of the limitations to be inserted in the settlement (a).

Then, as regards the presumed intention of the testator, the presumption rather is, that, being totally silent as to the lapsed share of the residuary personalty when he had taken pains to dispose of the lapsed pecuniary bequests, the testator did not intend to pass the former to *John Birkett*.

[He cited *Bonner v. Bonner* (b) and *Henwood v. Overend* (c).]

Mr. *Kay* having replied, the Court reserved judgment.

Dec. 20th.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case comes on to be determined upon a petition presented by certain legatees under the will of *George Gibson*.

The testator gave several pecuniary legacies to various persons, and among them a legacy of £500 to *Mary Birkett*, to whom he also gave an interest in so much of

(a) 5 Ves. 422.
 (b) 13 Ves. 379.

(c) 1 Mer. 23; S. C., 13 Ves. 383, n.

another legacy as should not be exhausted by the original trusts. He then bequeathed his residuary personal estate in these words: "And all the residue of my personal estate whatsoever I give and bequeath unto all the before-mentioned pecuniary legatees (except my servants and executors, and the said *Thomas Pearson* as trustee for *Joseph Pearson*), and to be divided between them in proportion to their respective pecuniary legacies."

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The petitioners were five of the pecuniary legatees under the will, who were not within the exception I have read.

On the 9th March, 1854, the testator executed a codicil, whereby he recited that *Mary Birkett* was dead; and in consequence of that he gave the £500 bequeathed to her, and her interest in the legacy of £200, to *John Birkett*, upon trust to pay the same to the children of *Mary Birkett* on their attaining twenty-one.

The contention on the part of the petitioners was, that, *Mary Birkett* being dead, all that passed to *John* by the codicil was the £500 and her interest in the £200, no mention having been made of the share of residue; and that the whole residue passed to the remaining pecuniary legatees who were not within the exception.

I decided at the hearing of the petition that this last claim could not be sustained, on the ground that there were indications in the will that the residuary bequest was not intended as a bequest to a class, but as a bequest to the individuals previously named by the testator.

The claim of the petitioners being excluded, the fund is next claimed by *John Birkett* as trustee for the children of *Mary Birkett*, claiming under the codicil. He says, that the intention of the codicil was to put him in the place of *Mary Birkett* in all respects; that the effect of the codicil is the same as if his name had been substituted for that of

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Mary Birkett in the bequests of £500 and £200, in which case he would have been entitled to the share of residue by the will bequeathed to *Mary Birkett*.

Considering that there was some doubt upon this point, I required the next of kin to be brought before the Court. This has been done; and after hearing the point fully argued, I feel bound to decide in favour of the next of kin.

The testator, being aware of the death of *Mary Birkett*, and having in consequence given the £500 and the interest in the £200 to *John Birkett*, upon trust for the children of *Mary Birkett*, does not go on to say a word as to the share of residue which had also been given to *Mary Birkett*, not (as I have already held) as one of a class, but as an individual nominatim.

Mr. *Kay* ingeniously argued the case as if it were governed by the authority of *Lord Carrington v. Payne* (a); but the decision in that case turned upon special circumstances; and Lord *Alvanley* expressly guarded himself against deciding a point very like that which I have now to determine.

In *Lord Carrington v. Payne* the testator by his will devised real estates to trustees and their heirs, upon trust to convey in such manner that they should stand limited to the use of *Edward Pearce* for life, with remainder to his first and other sons in tail; remainder to *William Pearce*, and his first and other sons in the same manner; remainder to *George Pearce*, and his first and other sons in the same manner; remainder as a reversion in fee to the testator's youngest brother and his heirs; and directed that the residue of his personal estate should be laid out in the purchase of real estate, to be settled to the same uses as he had thereinbefore directed respecting the real estates which he had so

devised. After this he made a codicil, by which he revoked so much of his will as directed the settlement of his real estates to *William Pearce* for life, and all the subsequent limitations; and instead thereof directed the same estates to be limited, after the decease of *Edward Pearce* and failure of his issue male, to the use of *George Pearce* for life, with remainder to his first and other sons in tail; remainder to *John Pearce* for life, and his first and other sons in tail; remainder to *William Pearce* for life, and his first and other sons in tail, in like manner; with the ultimate remainder as a reversion to the testator's youngest brother and his heirs as before. But the codicil was silent as to the testator's residuary personal estate. *Edward* having died without issue, it was argued, first, for the next of kin, that there was an intestacy with regard to the lands to be purchased with the residuary personal estate, inasmuch as the codicil, though it revoked the devise of the testator's real estates to *William Pearce*, and the subsequent limitations, had been silent with regard to the lands to be purchased with the residuary personal estate, and which were to be settled to the same uses; secondly, on behalf of *William*, that the codicil having been silent with regard to the lands to be purchased with the residuary personal estate, the direction in the will that they should be settled to the uses in the will declared of the testator's real estate, remained unaffected by the codicil; and that the testator must be taken to have left the estates which he had directed to be purchased with his residuary personal estate to go to the same persons and in the same order as directed by the will,—in other words, to go exactly as if the codicil had not been executed. Lord *Alvanley* held that neither of these contentions could prevail, and the decree declared that the residuary personalty ought to be laid out in the purchase of lands to be settled to such uses as the lands which passed by the will, except so far as the same were varied by the codicil. But the ground of that deci-

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sion was, that, in Lord *Alvanley's* view, the whole scope of the will was to unite the lands to be purchased out of the residuary personalty with the lands devised by the will; and the codicil made no alteration with regard to that union.

But although the decision in *Lord Carrington v. Payne*, turning as it did upon the special circumstances of that case, cannot govern the case before me, I find in Lord *Alvanley's* judgment some observations in which he expressly guards himself against deciding anything at all resembling the point for which Mr. *Kay* contended.

In the course of the argument in *Lord Carrington v. Payne*, the case of *Lord Sidney Beauclerk v. Mead* (a) had been mentioned as an authority in favour of *William Pearce*; and his counsel had also cited the case of *Darley v. Langworthy* (b), where, upon a devise of freeholds to certain uses, followed by a bequest of leaseholds to trustees, to convey to the uses of the freeholds, so that they should not be separated—the testator having afterwards suffered a recovery, which operated as a revocation of the devise of his freehold lands, the House of Lords held, reversing the decision of Lord *Camden* (c), that the bequest of the leaseholds was not revoked: a decision with reference to which Lord *Eldon* remarked, that he should be disposed to agree with the opinion of Lord *Camden* rather than with the judgment of the House of Lords (d). Referring to these cases, Lord *Alvanley* says, that, during the argument, they appeared to him to have a strong bearing upon the case before him, but upon consideration he found them different. “It was said,” he adds, “that when one species of property is devised in a particular manner, and in the same will another species of property is declared to be annexed to it, as it was in the case of *Darley v. Lang-*

(a) 2 Atk. 167.

(b) 7 Bro. P. C. 177.

(c) S. C., under the name of

Darley v. Darley, Amb. 653.

(d) Per Lord *Eldon*, in *Southey v. Lord Somerville*, 13 Ves. 492.

worthy, or, where it is given to the same persons as the other estates, and by act of law or by codicil the disposition of the former is revoked or altered, the latter shall not be revoked or altered, unless it is manifest the testator intended to affect that. I am willing, for the sake of argument, to admit this ; but it does not in any way affect this case." Then follows this important passage : " I admit the testator does not by these words include the lands to be purchased ; and if by the will he had given to certain persons the lands he was seised of, and had by that will directed his personal estate to be laid out in land for the benefit of the same persons to whom the real estate was devised " (exactly the case I have here), " and by a codicil he had given the estates of which he was seised to different persons and in a different manner, and had used no words applicable to the personal estate, the codicil might upon those two cases have [had] the effect of disuniting them, and the personal estate would have gone to the same persons as if the codicil had never been made."

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The hypothetical case, thus put by Lord *Alvanley*, is exactly the case before me.

The case of *Lord Sidney Beauclerk v. Mead* (a) is very similar to the hypothetical case put by Lord *Alvanley*. There, by his will the testator devised his freehold lands to Chief Justice *Reeve* for life, with remainder over ; and directed the surplusage of his personal estate to be laid out in the purchase of lands, to be settled to the same uses as his freehold lands. By his codicil he directed his dwelling-house to go as devised by his will ; but, as to the rest and residue of his lands, tenements, and hereditaments, by his will given to Chief Justice *Reeve* for life, he directed them to be equally divided between Chief Justice *Reeve* and Lord *Sidney Beauclerk* during their joint lives. The bill

(a) 2 Atk. 167.

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was filed by Lord *Sidney*, after the death of Chief Justice *Reeve*, to recover a moiety of the interest and profits of the surplusage of the testator's personal estate which had accrued during the lifetime of the Chief Justice *Reeve*. Lord *Hardwicke* dismissed the bill, being of opinion, that, neither upon the language of the codicil nor upon the presumed intention of the testator, could there be any ground for holding that the codicil affected the disposition in the will contained of the surplusage of the testator's personal estate.

The present case appears to me precisely similar both to that of *Lord Sidney Beauclerk v. Meade*, and to the hypothetical case put by Lord *Alvanley* in the passage I have read from his judgment in *Lord Carrington v. Payne*.

It was argued, that, by adopting this view, I shall hold the testator to have died intestate to the extent of the share of the residuary personalty which would have been apportioned to *Mary Birkett* in case she had survived the testator; and that the Court will presume, as far as possible, that a testator did not intend to die intestate. I admit that to be so; but, though the Court presumes that a testator did not intend to die intestate, it may be driven to the conclusion that he has done so in spite of the presumed intention to the contrary. In the present case I am driven to that conclusion. In making the codicil in question the testator had his will present to his mind; he had before him not only the legacies bequeathed by his will to the several pecuniary legatees nominatim, but also the bequest in his will, to the same legatees, of his residuary personal estate. Yet in the codicil he refers exclusively to the pecuniary legacies, and takes no notice of the residue. Under such circumstances I cannot hold that the codicil had the effect of passing to the legatee under the codicil, not only the legacy given to him by the codicil, but also a share of the residue, as to which it is totally silent.

Then as to the inference which Mr. Kay attempted to draw from the case of *Johnstone v. Lord Harrowby* (a) and the authorities there cited—viz. that substituted legacies carry with them all the same incidents as the legacies for which they are substituted, I am not aware that the rule which those cases establish has ever been extended to that length; and it was decided in *Re More's Trust* (b) by Lord Justice Turner when Vice-Chancellor, that it cannot be applied to a case where, as here, its application would alter the limitations of the property.

I must, therefore, hold that there was an intestacy as to the fund in court, and that the next of kin are entitled to it.

THE Court being of opinion that the next of kin are entitled to the fund in court, tax and pay costs of all parties out of the fund (the costs of the trustees and next of kin as between solicitor and client, and the costs of the petitioners and John Birkett as between party and party); and let the residue of the fund be paid to the next of kin.

(a) 1 D. G. F. & J. 183.

(b) 10 Hare, 171, 176.

1861.
RE GIBSON.
Judgment.

Minute of
Order.

~~7 Feb 1863~~ 9 ch. 41.
RE MACFARLANE. 33 Dec 24/1
UNDER the trusts of the will of Mary Blanch, George Macfarlane, a person of unsound mind, but not found lunatic by inquisition, was entitled to a reversionary interest, which fell into possession in February, 1859, and which, as ultimately transferred and paid into court by the surviving trustees of the will under the Trustee Relief Act, and invested, consisted of a sum of £633 Consols.

1862.
March 8th.
Lunatic not so found by Inquisition—Jurisdiction—Past maintenance.
Applications relating to the property of persons of unsound mind not found lunatics by inquisition, which is in or under the administration

tion of the Court of Chancery, are entertainable by the Court in its ordinary jurisdiction:

Re Irby, 17 Beav. 334, not followed.

Where a person of unsound mind, not found lunatic by inquisition, had been wholly maintained by his father at an expense, since the attainment of his majority, greater than the value of a sum of stock belonging to him, which had been paid into court under the Trustee Relief Act, and which constituted his whole property, the stock was ordered to be sold and paid to the father, in part satisfaction of the moneys expended by him upon his son's past maintenance, upon his undertaking to continue the maintenance for the future.

1862.
 RE
 MACFARLANE.
 Statement.

George Macfarlane attained his majority on the 27th of July, 1848, and having, as early as the year 1851, shown symptoms of unsoundness of mind, was, in 1854, sent by his father, who resided at the *Mauritius*, home to *England*. On his arrival, he received an allowance weekly out of the moneys of his father for his support. Since the 8th March, 1856, he had been under the care of Dr. *Sutherland*, and afterwards of Dr. *Willett*, at an expense of £809, which was entirely defrayed by his father, as were also various other expenses upon his maintenance since he came of age, estimated to exceed in the aggregate the sum of £400.

The fund in court constituting the whole of his property, and there being no probability, in the opinion of Dr. *Willett*, of his ever recovering from his mental disorder, he presented this petition by his father as next friend, praying that the sum of £633 Consols standing in court might be sold, and that the proceeds of the sale, and any cash which might be standing to the account, might, after payment of costs, be paid to his father, in satisfaction, so far as the same would respectively extend, of the moneys so expended by his father for his maintenance and support, his father being willing to undertake to continue the due and proper maintenance and support of the petitioner.

Mr. *R. Horton Smith*, for the petitioner :—

What is asked was, under similar circumstances and upon a similar undertaking, done by this branch of the Court in *Re Law* (a).

Mr. *Dewsnap*, for the trustees :—

The only question is as to the jurisdiction of this branch of the Court to make an order at all—whether a petition of

this nature should not have been presented to the Lord Chancellor or Lords Justices sitting in Lunacy? The present Master of the Rolls was of that opinion: *Re Irby* (a).

1862.
RE
MACFARLANE.
Statement.

Mr. *E. F. Smith* (*amicus curiæ*):—

When the cause of *Light v. Light* (b) came on before the Lords Justices on further consideration, as mentioned in 25 Beav. (c), the Lord Justice *Turner* stated, that he had no doubt that the Master of the Rolls (as a Judge of the Court of Chancery, and exercising its ordinary jurisdiction,) would have had authority to have directed the application of the annuities there mentioned, or any property under the control of the Court belonging to a person of unsound mind not found lunatic by inquisition, for his benefit; and he wished that the Master of the Rolls should be made acquainted with his opinion.

Mr. *R. Horton Smith* mentioned *Re Berry* (d), where Lord *Langdale*, after consideration, made an order affecting the property of a person of unsound mind not found lunatic by inquisition.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think that applications relating to the property of persons of unsound mind not found lunatics by inquisition, which is under the administration of the Court of Chancery, are entertainable by the Court in its ordinary jurisdiction.

Judgment.

The order will be as prayed, the father undertaking to continue the maintenance and support of the petitioner, his son.

(a) 17 Beav. 334.

(b) 25 Beav. 248.

(c) Page 252.

(d) 13 Beav. 455.

1861.

April 18th.

Award—Misconduct of Arbitrator—Jurisdiction—Stat. 9 & 10 W. 3, c. 15.

A. having brought an action against *B.*, and *B.* a cross action against *A.*, the same, and all matters in difference were by a judge's order by consent referred. *B.* died pending the reference; and before administration could be taken out, the arbitrator, notwithstanding a protest, proceeded ex parte, and made an award directing payment of a sum of money and costs to *A.* *A.* had filed a creditors' bill for the administration of *B.*'s estate, founded upon the alleged debt under the said award:—

Held, on demurrer, that a bill would not lie by *A.*'s executor praying that the bill in the creditors' suit might be dismissed and the award set aside.

228 Jc H. 314 HARDING v. WICKHAM.

THIS case came on upon demurrer; the material statements in the bill being as follows:—

The Plaintiff was the executor of *Charlotte Harding*, deceased.

The said *Charlotte Harding* had carried on the business of a brewer, and the Defendant *Wickham* had acted as her manager, under an agreement dated February 5th, 1858.

The business became unprofitable by reason of the neglect of *Wickham*; and in September, 1858, Mrs. *Harding* gave him notice that she had assigned the brewery to a Mr. *Wescombe*, and on December 4th, 1858, gave the Defendant a notice of dismissal.

On December 8th, 1858, *Wickham* commenced an action against Mrs. *Harding*, seeking damages for alleged wrongful dismissal; and on February 8th, 1859, Mrs. *Harding* commenced an action against *Wickham* for money due and for breaches of the agreement of February 5th, 1856.

By an order made on July 8th, 1859, in both actions, by Mr. Justice *Bramwell*, it was by consent ordered that the causes and all matters in difference should be referred to the award of an arbitrator therein named, so that he should make his award ready to be delivered to the parties (or their personal representatives, if either should die before the making of the award) on or before November 1st, 1859, or such further day as the arbitrator should by indorsement

The Court of Chancery has no jurisdiction to set aside an award made under a reference of an action at law, whether the same be or be not under the statute 9 & 10 W. 3, c. 15.

appoint; that the costs of both actions, and of the reference, should be in the discretion of the arbitrator; that neither party should proceed at law or in equity against the arbitrator, or bring any writ of error, or prefer any bill in equity against the other concerning the matters referred; "that the arbitrator might proceed *ex parte* if either of the parties should refuse or neglect to attend before him without reasonable excuse;" that, in the event of either of the parties disputing the validity of the award, or moving the Court to set the same aside, the Court should have power to remit the matters referred, or any of them, to the consideration of the arbitrator; that the proceedings in the reference should be public, and be held at such times and places as the arbitrator should appoint; and that the order should be made a rule of court.

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HARDING
v.
WICKHAM.
Statement.

Under the direction of the arbitrator *Mrs. Harding* delivered to *Wickham* a statement of the charges of negligence and misconduct.

The time for making the award was duly enlarged to November 2nd, 1862.

Mrs. Harding was prepared with important evidence to produce before the arbitrator in support of her statement, and in opposition to *Wickham's* claim; and December 27th and 28th were appointed by the arbitrator for the hearing.

On December 23rd, 1859, *Mrs. Harding* died, having appointed the Plaintiff her executor. The Plaintiff did not act until after the date of the award hereinafter mentioned, and did not prove the will until June 15th, 1860.

The fact of the death of *Mrs. Harding* was communicated to the arbitrator within twenty-four hours by a *Mr. Roberts*, who had been her solicitor in the reference, with an application that the hearing might be postponed until the

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reference could be proceeded with in the presence of a legal personal representative of the deceased : but the arbitrator refused to postpone the hearing ; and Mr. *Roberts* gave him immediate notice that he would not attend.

The arbitrator accordingly proceeded *ex parte* on December 27th ; and on January 2nd, 1862, made his award, directing payment to *Wickham* of a considerable sum of money and costs by the personal representative of Mrs. *Harding* out of her assets.

On November 12th, 1860, *Wickham*, as a creditor by virtue of the award, filed a bill against the present Plaintiff, who had then proved the will on behalf of all creditors, for the administration of Mrs. *Harding's* estate, in which he stated that the award had been made a rule of court. The Plaintiff insisted that the award was void, and was advised that an application to the Common Law Court might be sustained for the purpose of setting it aside ; but stated, that, the Defendant *Wickham* having taken no steps since the proof of the will to enforce the award at law ; the Plaintiff, believing himself entitled to resist it on equitable grounds without an order to set the award aside, did not incur the expense of an application for that purpose to the Court of Law.

The Plaintiff further insisted, that whatever might be the validity of the award at law, it was insufficient to invest the Defendant *Wickham* with the character of a creditor, so as to entitle him to sustain an administration suit.

The bill prayed that the bill filed by the Defendant might be dismissed with costs ; that the award might be declared void in equity ; and for an injunction to restrain proceedings for enforcing the same.

To this bill the Defendant demurred.

Mr. *Rolt*, Q.C., and Mr. *W. Pearson*, for the demurrer:—

This is a bill to set aside an award, which will not lie in any case of a reference within the statute of 9 & 10 Will. 3, c. 15, or within the Common Law Procedure Act.

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—
Argument.

The object of the statute of Will. 3, was to exclude the jurisdiction of any other Court except that of which the award is to be made a rule, in respect of anything done under the reference, whether ultra vires or not; and it cannot be contended, that the death abated the powers of the arbitrator under this reference: *Tyler v. Jones* (a), *Clarke v. Crofts* (b), *Lewin v. Holbrook* (c). The reference contains a declaration that the order should be made a rule of court, and is therefore within the statute. In *M'Dougal v. Robertson* (d), the submission was similar to the present one; and there are abundant authorities to the effect that this Court has no jurisdiction in such cases, notwithstanding fraud: *Davis v. Getty* (e), *Dawson v. Sadler* (f). *Nicholls v. Roe* (g) was reversed on appeal (h), when it was held that this Court has no jurisdiction, although the submission have not yet been made a rule of the Court of Law: *Heming v. Swinerton* (i), *Auriel v. Smith* (j), *Gwinett v. Bannister* (k), *Londonderry & Enniskillen Railway Company v. Leishman* (l).

The statute of Will. 3, applies to this case, although it included the reference of an action, because it is not merely an order referring the cause, but also all matters in difference, and moreover it is by consent.

- (a) 3 B. & C. 144.
- (b) 4 Bing. 143.
- (c) 11 M. & W. 110.
- (d) 4 Bing. 435.
- (e) 1 S. & S. 411.
- (f) Id. 537.

- (g) 5 Sim. 156.
- (h) 3 M. & K. 431.
- (i) 14 Sim. 588.
- (j) T. & R. 121.
- (k) 14 Ves. 530.
- (l) 12 Beav. 423.

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 {
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 —
 Argument.

[The VICE-CHANCELLOR observed, that, in *Regina v. Hardey* (a) and other cases (b), the question had been considered, what was the effect of the words "all matters in difference," and also the effect of a submission by parol.]

There is nothing in the statute to require a submission in writing. The bill implies that the award has in fact been made a rule of court; but this is not necessary to bring it within the statute, as was held in *Heming v. Swinnerton*. The case is, therefore, within the statute, and this Court has no jurisdiction. Even if this were not so, there is no ground for interference. The parties have chosen their forum, and must abide by it; and there was nothing to prevent the executor acting in the reference before he had proved. The case does not come near to those in which the jurisdiction was declined. Further, if we are out of the statute for one purpose, we must be for all; and the statutory restriction as to the time for making an application in the Court of Law cannot be urged as a ground for this Court entertaining the matter.

There being no jurisdiction to set aside the award, what difference does it make that the Defendant has filed a creditors' bill? If he has no debt, that bill may be dismissed at the hearing; but you cannot file a bill (not being a cross-bill, which this is not), for the purpose of having another bill dismissed.

Mr. Giffard, Q.C., and Mr. Shee, for the bill:—

This is not a reference within the statute of Will 3. It was held in *Chuck v. Cremer* (c), that a reference at Nisi Prius is not under the statute. The whole effect of the Act is to enable parties to a submission to make it a rule of court.

(a) 14 Q.B. 529

(b) See *Ansell v. Evans*, 7 T. B. 1.

(c) 2 Ph. 477. See also *Lucas v. Wilson*, 2 Burr. 702.

Mr. Rolt mentioned *Bhear v. Harradine* (a).

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The VICE-CHANCELLOR.—In *Reg. v. Hardey* the Court intimates that the power of tacking all matters in difference to the reference of a cause is inherent in the Court of common law.

Mr. Giffard.—The cases at law as to the statutory limitation of the time for applying to set aside an award always distinguish references of actions, whether with or without the clause as to all matters in difference, from submissions under the statute: *Russell* on Arbitration (b).

In the case of a simple *Nisi Prius* reference the rule as to time is the same as on a verdict. When "all matters in difference" are included, the rule as to time is borrowed by analogy from the statute, but not on the idea that these are actually submissions under the statute.

Then, even, if this were within the statute, there is no exclusion of jurisdiction. The case of *Londonderry & Enniskillen Railway Company v. Leishman* is the only authority to that effect. Courts of law constantly refuse to set an award aside on motion, leaving the defence to be pleaded in an action on the award. Here is a bill founded on the award, and we are entitled to set up the defence of fraud; and this we may do by a cross-bill. We are not bound to take it by answer only. The Court does not know on this demurrer that an answer has been called for, and we have a right to file a cross-bill for the purpose of discovery, and to get a decree against the original Plaintiff. That this is strictly a cross-bill is clear, and it is not necessary to show any ground of equity: *Mif. Pl.* (c), *Story's Eq. Pl.* (d). The practice of cross-bills is derived from

(a) 7 Exch. 269.

(c) Pages 81, 82.

(b) Part 3, ch. ix. sects. 1 & 2,
pp. 666, 687.

(d) Page 263, sect. 402.

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the canon law ; and such a bill is not open to demurrer. except to raise the question whether it is a cross-bill, i.e. whether it sets up a defence to the original bill.

We cannot proceed effectually at law upon a motion, because we can have no compulsory evidence ; and this Court, therefore, has a superior power of doing justice, and can do it effectually by imposing any terms that may be proper at the hearing. A cross-bill was the proper course, and not a bill of discovery, because the latter would not have been available at the hearing ; and it is settled, that you cannot demur to the relief asked by a cross-bill. It cannot be said, that the fact, that the proceedings were *ex parte*, is not material to be considered upon the hearing of the original bill founded on the award ; and if a material defence is stated the cross-bill is not demurrable.

[They also referred to the Common Law Procedure Act, 1854, sect. 3, and *Powell v. Hall* (a).]

Judgment.
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VICE-CHANCELLOR SIR W. PAGE WOOD :—

I think this case is concluded by the authorities. The only point is, whether the bill can be sustained as a cross-bill.

The judge's order, which was made by consent, referred the causes (which were in the Court of Exchequer,) and all matters in difference. The arbitrator was thereby empowered to proceed *ex parte*, if either of the parties should refuse or neglect to attend before him without reasonable excuse. The parties were prohibited from bringing any action or suit, and power was reserved to

(a) 3 De G. & S. 456.

the Court, on motion, to set aside the award, or to remit the matters referred or any of them to the arbitrator; and it was directed that the order of reference should be made a rule of Court.

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Judgment.

The only doubt upon this is, whether it is a reference under the statute of Will. 3, or at common law. That point is not very clear upon the authorities, but it is not necessary to decide it. The authorities cover references both at common law and under the statute. The two cases of *Chuck v. Cremer*, and *Londonderry & Enniskillen Railway Company v. Leishman*, seem to show that it is immaterial, in a case like this, whether the reference is under the statute or at common law. The doubt in the common law courts seems to have been, whether they had an inherent power to tack a reference of all matters in difference to the reference of a cause. However this may be, it seems to have been considered, that, when all matters in difference were included, the Court was bound, at any rate, by the analogy of the statute of Will. 3. This goes some way to support the inference, that where all matters in difference are included in the reference, this Court is in like manner bound by the analogy of the statute, a consideration which is in itself almost sufficient to bring the present case within the principle of the authorities upon references under the statute. But even assuming that the order of reference was made under the common law power of the Court, and not under the statute, the cases are still sufficient to exclude the jurisdiction.

In *Chuck v. Cremer*, Lord Cottenham puts it thus: "That a certificate or award under a reference at Nisi Prius is not under the statute, and therefore not within its restrictions, is now settled. Under such a reference, as Lord Eldon observed in *Nichols v. Chalie*, all the subsequent proceedings are nothing more than part of the transactions in the course of the suit at law in that Court, which this Court would, upon its ancient

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jurisdiction, control. This is, I think, clearly a right view of the case. The parties proceeding at law, it must be immaterial whether the judgment be founded on a verdict or the certificate of an arbitrator, for the purpose of controlling such judgment in a Court of equity upon grounds paramount the legal rights, however enforced. But what is there to give to a Court of equity any peculiar jurisdiction in case of a judgment founded upon such an award, which it would not have had if it had been founded upon a verdict? Does a Court of equity obtain any jurisdiction to interfere from the course of proceeding under such a reference, when the nature of the question between the parties does not raise an equity? That failure at law from the errors of the judge or the jury, or in the conduct of the cause, will not, per se, give this Court jurisdiction, is certain; does a different rule prevail where the failure is attributable to any conduct in the arbitrator? In all these cases the Court of law has power to correct the error, if the party takes the proper steps to obtain such redress."

The principle thus laid down was acted upon by Lord *Langdale* in the case of the *Londonderry & Enniskillen Railway Co. v. Leishman*, and it amounts to this, that where the case set up in equity is not fraud or other matter wholly dehors the matter tried at law, but merely error in the conduct of a cause (including therein error of an arbitrator under an order of reference), in such case, if the Court of law has power to correct the error, it is not proper for a Court of equity to interfere. It is true, that the passage I have read from Lord *Cottenham's* judgment was only a dictum; but in the case at the Rolls, Lord *Langdale* had to decide the very point. The averment there was of fraud in the conduct of the arbitration by the Plaintiffs' engineer, which the Plaintiffs had no means of detecting until after the close of the proceedings. Lord *Langdale* says, "I cannot doubt but that if the case were a proper

one, the Court of law would have attended to it, and that relief would have been afforded. . . . If the Plaintiffs have chosen another jurisdiction instead of coming into this Court at first, and have agreed to a reference, and submitted to an order of a Court of law, is there any reason why they are to be relieved from the consequence of what they have done by the exercise of the equitable jurisdiction of this Court? It must not be thought that I am here proceeding upon the notion that this Court will not relieve in a case of fraud, if fraud be made out. I say that this Court will not, on an allegation of fraud, interfere in a matter where another jurisdiction has been adopted, where the matter has proceeded under the jurisdiction of another Court, and where there is nothing to show, that, upon an application being made to that Court, it has not full jurisdiction and power to grant to the Plaintiffs every proper relief."

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That case was somewhat stronger than the one now before me. Lord *Langdale* declined to act unless it were shown that the Court of law could not grant relief. Here the Plaintiff avers his belief that the Court of law would grant relief.

It follows, therefore, that, quite irrespective of the Statute of Will 3, this Court will not interfere to disturb what has been settled by a competent Court, where the miscarriage alleged is not anything dehors the proceedings, but the improper conduct of an arbitrator appointed in the cause. This Court is bound to assume that the proper Court will do justice in the matter.

There remains only the point raised as to this being a cross-bill. The bill contains the prayer that another bill may be dismissed with costs; and also seeks to restrain proceedings on the award, and to have the same declared void. The only grave question is, whether, under these circumstances, it is to be treated as a cross-bill. The Plaintiff contends, that the alleged misconduct is open to him as

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a defence to the original bill, just as everything would be open to him as a defence to an action on the award. But this involves a misapprehension. Let me first consider what would be open to the Defendant in such an action. He could not plead the misconduct of the arbitrator, not even if it amounted to corruption. It was held in *Veale v. Warner (a)*, that a plea of collusion by the arbitrator was bad, and this was followed in a series of later authorities.

This case is wholly founded on the misconduct of the arbitrator in proceeding after the death of the party, and when there was no opportunity for her representative to appear. But what jurisdiction has this Court to set aside the award? All that the Plaintiff can be entitled to on this ground is discovery of facts which he may think material; but even for the purpose of discovery he cannot go into evidence as to alleged misconduct of the arbitrator, or of miscarriage of the proceedings through the absence of one of the parties. These are merely matters of procedure in the Court of law, which that Court alone should deal with. It would be the same thing in principle to raise a question in this Court whether a common law judge had conducted a trial rightly, whether a jury had not acted corruptly, or any other controversy of the like kind.

The jurisdiction of another Court has been chosen, and there is nothing before me beyond the question whether that jurisdiction has been properly administered in the course of procedure followed. Moreover, not only am I not satisfied that the Court of law is incompetent to give redress, but there is an averment of the Plaintiff's belief to the contrary.

There is, therefore, no defence set up which can be

(a) 1 Wms. Saund. 327 a, note.

raised by a cross-bill, nor any relief asked which can be granted. The facts averred would be no defence to an action at law, and are no defence to a suit in equity.

The demurrer must be allowed, with costs.

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HARDING
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Judgment.

LEDGER v. STANTON.

THIS was a special case, the Plaintiffs being the executors of a Mr. *Arnold*, and the Defendants the persons entitled under a specific bequest in the testator's will of a leasehold mill and premises.

The lessor, *Hamilton*, himself a termor, was, at the time of granting the lease, indebted to *Arnold* to the amount of £1,200. The lease was dated on October 15th, 1853, and thereby *Hamilton* demised the mill and premises to *Arnold*, at a rent of £300 a-year. No reference was made in the lease to the existing debt.

By an indenture of even date between the same parties, after reciting that £1,200 was due from *Hamilton* to *Arnold*, and that it was agreed that the lessor should be bound and the lessee should be at liberty to reduce the rent payable by an annual sum of £40, until the debt should be satisfied, and that the lease should constitute an additional security for so much as should from time to time remain unpaid: It was witnessed, that *Hamilton* covenanted out of the rent to pay the sum of £40 a year towards the gradual extinction of the debt until the same should be fully paid, and *Arnold* covenanted to accept such payments in satisfaction.

1862.
June 8th, 25th.
Lease—Cove-
nant to remit
part of Rent—
Release.

By a deed of even date with a lease, the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee:—
Held, that

though the covenant might be pleaded at law as a release pro tanto of the rent, this was only to avoid circuity of action, and the covenant was not for all purposes a release. Therefore, the lessee having specifically bequeathed the premises subject to the rent:—

Held, as between the executors and the specific lega-

tees, that the specific legatees took subject to the whole rent, and that the benefit of the covenant for reduction of rent went to the executors.

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The payments would continue during the whole term before the debt would be satisfied.

Arnold, the lessee, by his will, dated December 19th, 1856, specifically bequeathed the leasehold premises, "subject to the ground rent of £300, or other the rent or rents reserved by and in the covenants and agreements contained in the lease or leases under which the said mill and premises are or may at my death be holden." The question was, whether the executors or the specific legatees were entitled to the benefit of the annual sum of £40, under the covenant.

Argument.

Mr. *Wigram*, for the Plaintiffs:—

The specific legacy is clearly subject to the whole rent of £300, unless the transaction between the lessor and lessee amounted to an absolute release of a part of the rent. This, however, was not so; the full rent of £300 remained payable as rent, and the £40 a year was annually deducted towards payment of an independent debt.

Mr. *Fry*, for the Defendants:—

The indenture of even date with the lease was part of the same transaction, and in law it amounted to a release, pro tanto, of the rent. Then the bequest is subject to whatever the rent may be, and that is £260, and not £300. It is quite clear, that, when there is a defeasance by the same instrument by which the liability is created, that is in law an absolute release: *Johnson v. Carre* (a), *Fowell v. Forrest* (b). And the effect is the same when the defeasance is by a contemporary deed: *Lacy v. Kinaston* (c), *Gawden v. Draper* (d).

(a) 1 Lev. 152.

(c) 1 Ld. Raym. 688.

(b) 2 Wms. Saund. 47 ~~2~~ 2.

(d) 2 Vent. 217.

In this last case the covenant was one empowering a husband to detain part of an annuity during cohabitation, and it was held not to be a defeasance; but it was said, that if it had been a rent, the result would have been as in *Lacy v. Kinaston*. *Smith v. Mapleback* (a) supports the same view. It follows from these authorities that in an action for rent *Arnold* could have pleaded the covenant as a release qua £40 of the rent.

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Then there is nothing in the will to subject the bequest to any rent except that which was legally payable, or to re-create the £40 of rent which had been released.

Mr. *Wigram*, in reply.—The very object of the two deeds was to keep the rent of £300 and the debt of £40 a year separate and subsisting.

As to the cases cited, they only prove at most that the covenant could be pleaded at law as a release to avoid circuity of action, not that it amounts to a release for all intents and purposes.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

June 25th.
Judgment.

This matter comes before me on a special case, the question being, whether a deduction of £40 from the rent of certain leasehold premises specifically bequeathed to the Defendants is to enure for their benefit, or to go to the executors of the lessee. [His Honour then stated the facts of the case.] The Defendants' contention is, that the rent is to be taken as released to the extent of £40, so that £260 must be considered as the rent reserved, subject to which the specific bequest was made. The point was

(a) 1 T. R. 441.

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very ingeniously argued ; but, upon looking into the authorities, I think that they do not fully support the inference sought to be drawn from them, that the covenant actually released and extinguished the rent *pro tanto*. In *Lacy v. Kinaston* it was laid down, that if, A. and B. being jointly and severally bound, the obligee of the bond covenants with A. not to sue him, the bond is not gone. If such a covenant amounted to a release, the bond would be discharged altogether ; but what was settled was, that such a covenant was not an actual release in its nature, but only by construction, in order to avoid circuity of action ; and this principle was followed in *Dean v. Newhall* (a).

In this case the reversion happens to be a chattel interest, but the demise might have been made by an original lease from the owner of the fee, and followed by this covenant by the lessor. If, then, the reversion in fee had descended on the heir, the lessee never could have set up this covenant against the heir in answer to a demand of the rent. He would have been entitled, as against the executors of the lessor, to payment of the amount ; and if the heir were not bound by the words of the covenant, it could not be pleaded against him.

The result of the cases is only to show, that, at common law, where, on the one hand, an obligation is created, and on the other there is an undertaking by way of defeasance, (not necessarily by the same instrument, or by a deed of even date), there the rule prevails, that, to avoid circuity of action, the form of pleading the defeasance as a release shall be allowed, but in substance the debt remains, unless the right and the obligation continue in the same person.

Here, the stipulation for the payment of the £40 a-year enures for the benefit of the executors of the lessee, and

(a) 8 T. R. 168.

they would no doubt be entitled to plead the covenant by way of release in bar pro tanto of a demand by the lessor for payment of the whole rent under the lease. Still, the rent is not gone, and those who take the leaseholds under the specific bequest subject to the rent, must take them subject to the full rent of £300, and are not entitled, as between themselves and the lessee's executors, to set up the right of deducting the £40 annuity as an actual reduction of the rent.

Of course, the testator might, if he had so pleased, have given the right of deducting the £40 from the rent to the specific legatees of the leaseholds; but I can find in the will no indication of such an intention. On the contrary, the form of the expression which he uses is, "subject to the rent of £300, or other the rent or rents," &c. It was suggested, indeed, that these words might be understood as indicating a doubt in his mind whether the rent really was £300 or £260; but it does not appear to me that I can rely on this consideration; because it is obvious, that, if the testator meant to give the leaseholds subject only to a rent of £260, he could have said so in as many words; and I think his language must refer to some probable future change in the terms of the holding.

The answer must, therefore, be, that, as between the parties to the special case, the Plaintiffs are entitled to the benefit of the £40, the Defendants taking subject to the rent of £300.

There will be no costs.

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Judgment.

1862.

TYNTE v. HODGE.

Nov. 13th.

*Security for
Costs—Bill for
Defence—
Practice—
Chambers.*

A decree was made in several mortgagees' and annuitants' suits, directing accounts and inquiries and appointing a receiver, and authorising him, as the judge should direct, to keep down the interest on the incumbrances and pay the annuities; the costs of the several Plaintiffs to be added to their securities.

The Defendant, the mortgagee, filed a bill to impeach the annuity-deed on which one of these suits was founded, or in the alternative to avoid certain clauses as to interest on arrears:—
Held, that, the relief prayed being inconsistent with the decree already made, and the suit not being a proceeding by way of defence, the Plaintiff (who was out of the jurisdiction) was bound to give security for costs.

Applications as to security for costs may properly be made in chambers.

THIS was an adjourned summons by the Defendant, that the Plaintiff might be ordered to give security for costs.

The Plaintiff, who was a member of Parliament, described himself as of *Fenton's Hotel, St. James-street*, where it appeared that he had usually gone when he came to *London* to attend the House. It was proved, however, that he had been, for some time before filing the bill, resident at *Boulogne*.

The object of the present suit was to set aside an annuity deed. Several mortgagees' suits had previously been instituted against the present Plaintiff, *C. J. K. Tynte*—viz. *Ford v. Tynte*, *Ford v. Adams*, *Jones v. Tynte*, *Adams v. Tynte*, and *Hodge v. Tynte*.

The last of these was founded on the annuity deed sought by the present suit to be set aside.

A receiver was appointed in the first-mentioned suit; and an application for a receiver in *Hodge v. Tynte* was on that ground refused in another branch of the Court. Subsequently to this, all the suits were ordered by the Lords Justices to be transferred to the Court of V. C. *Wood*, in which a decree for accounts and inquiries had been made in *Ford v. Tynte*, the most advanced suit. A summons was subsequently taken out to obtain the direction of the Judge as to the mode of prosecuting the suits, and was adjourned into Court; and on the 16th of February a decree was accordingly made in all the suits except *Jones v. Tynte*, directing the inquiries and account ordered by the decree in *Ford v. Tynte*, and certain other inquiries, to be made and taken, staying the proceedings in

Jones v. Tynte, appointing a receiver in all the other causes, and authorising him from time to time, as the Judge should direct, to keep down the interest on the incumbrances in the pleadings of these causes mentioned, and the annuity and arrears of annuity granted in favour of the Plaintiffs in *Hodge v. Tynte*, and also any other annuities and rent-charges which should be certified to be charged on the said estates, and further ordering that the Plaintiff *Ford* should have the carriage of the order, and declaring that the Plaintiffs in these suits and the several Defendants who should be ascertained to be incumbrancers were entitled to add their costs of these suits up to the decree to their respective incumbrances, and adjourning further consideration.

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The present bill was filed on the 27th June, 1862, and sought to set aside the annuity transaction, the Plaintiff *Tynte* offering to pay to the Defendants (the Plaintiffs in *Hodge v. Tynte*) their advances, with interest, as the Court should direct, or to allow them in account. The bill also prayed, in the alternative, that, failing such relief, certain stipulations in the annuity deed for interest or arrears of the annuity should be declared void; and that, if and so far as necessary, the bill might be taken to be supplemental to the other suits.

A summons was taken out by the Defendants that the Plaintiff should give security for costs, and was adjourned into Court.

Sir *H. Cairns*, Q.C., and Mr. *Beavan*, for the Defendants:—

Argument.

The decree in the mortgagees' suit is not impeached in any manner by this bill, which is not, therefore, a cross suit, though the relief prayed is no doubt inconsistent with the former decree. The Plaintiff is a member of Parliament, and we have evidence to show that he is now permanently residing with his family at *Boulogne*, and that

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he had not been at *Fenton's Hotel* for some weeks previous to the filing of the bill.

Mr. *Rolt*, Q.C., and Mr. *Southgate*, for the Plaintiff:—

There is a preliminary objection. We ask for costs on the ground that this is not a case which should ever have been taken to chambers. The practice of taking matters to chambers is increasing to a degree detrimental to the interests of justice. The only authority to transact business at chambers is that of the Masters' Abolition Act, section 11, and the orders issued under section 26 of that Act. Those orders are Consolidated Orders 35, rule 1, which specify a number of cases, of which this is not one.

The VICE-CHANCELLOR.—The Act says "Applications relating to the conduct of suits or matters." Is not this of that nature?

Mr. *Rolt*.—If this be so, then so is everything; so would be a motion for a receiver.

The VICE-CHANCELLOR.—That comes under a later head, "Matters connected with the management of property."

Mr. *Rolt*.—Under the latter clause, it has been held (a) that you cannot apply for a receiver in the first instance at chambers, though you may for a re-appointment. Besides, on the merits, this application ought to be rejected. First, as to the alleged misdescription: the Plaintiff is an M.P., and necessarily resides a great part of every year in *London*, and when there this is his address; and although he was not there on the very day the bill was filed, still it is a bona fide address.

Besides, this is a bill of defence, though perhaps not technically a cross-bill. The rule is, that where a bill is filed which can in any result be a defence to an existing suit at law or in equity, the Plaintiff cannot be made to give security for

(a) *Grote v. Bing*, 9 Hare, App. 50.

costs: *Thornton v. Wilson* (a), *Sloggett v. Viant* (b), *Vincent v. Hunter* (c), *Macgregor v. Shaw* (d), *Wutteau v. Billam*, where the suit was to stay an action at law, *Wilkinson v. Lewis* (e), where the suit was for other purposes as well as defence.

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Lastly, the objection that the relief prayed is inconsistent with the former decree, is unfounded. If it were good for anything, the course would be to demur, or to move to take the bill off the file as a bill of review filed without leave. But in truth the two decrees may well stand together. The decree already obtained orders inquiries of a general nature, and no more; it does not even find as a fact that *Hodge* has any security, and we do not allege by our bill that he has none, but merely that he has not this specific one. The question is, whether, if we get a decree to set aside this particular security, we can use it as a defence in taking the accounts under the decree in *Hodge v. Tynte*. If so, this is a bill of defence, and we are not liable to give security for costs.

The VICE-CHANCELLOR.—I have no doubt that the application is one that may properly be made in chambers. It is an application relating to the conduct of a suit or matter; and it would be most unreasonable that such applications should, in every case, be made in open court. Moreover, under the concluding words of the 26th section of the Act, I have no doubt of my own authority to order, pro hac vice, that this application should be entertained at chambers. On the merits, I have this difficulty, whether I can decide on this application without in some manner pre-judging the question raised in the cause.

Sir *Hugh Cairns*, in reply.—The argument directed by the other side to that point was an attempt to shift the onus probandi: it is necessary that an application for security for costs should be made before the Defendant takes any step

(a) 1 Hogan, 20.

(b) 13 Sim. 187.

(c) 5 Hare, 320.

(d) 2 De G. & S. 360.

(e) 3 Giff. 394.

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in the cause; he will afterwards have an opportunity of demurring, or moving to take the bill off the file, or taking such other steps for his defence as he may be advised. At present, we are in this position:—the Defendant has proved that the Plaintiff is resident out of the jurisdiction, therefore he has a *prima facie* right to security for costs. It is for the Plaintiff to show that he comes within some known exception; and he cannot call on us to show that the Plaintiff cannot in any event use this suit as a defence to the Defendant's suit. That is not so; the onus is on the Plaintiff.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I do not mean to prejudge anything which may arise in the future progress of the suit; but I am clear that no decree can be made to set aside this security, which can stand along with the decree which has been made in the suit of *Hodge v. Tynite*. That decree (which was not made by consent) orders two things, either of which seems to me conclusive on this point: first, the receiver is to be at liberty to pay the whole of this annuity to *Hodge*; how can that be if the security is to be set aside? Secondly, *Hodge* is to add his costs to that very security: what is to become of those costs if this bill succeeds?

If the Plaintiff goes on in this suit, he may perhaps be able to make the proceedings available as the ground of a bill of review, or in some similar manner; but it is clear that the decree asked could never stand together with the existing decree. I cannot see any possible way in which I could act *under* the decree in *Hodge v. Tynite* so as to give any effect to a decree for the Plaintiff in this suit. *Against* that decree, I might act by staying all proceedings in chambers under that decree; but then that is not the proper operation of a bill which is simply a bill of defence to an existing suit. The Plaintiff must give security for costs.

1861.

February 28th.

Production—
Privilege—
Fraud—
Pleading.

A bill averred that the Defendant procured the execution of a jointure-deed under a power by pressure in fraud of the power, but there was no allegation that the solicitor who prepared the deed was a party to the fraud—*Held*, that the alleged fraud was not such as to exclude the instructions given by the Defendant to her solicitor for the preparation of the deed from privilege.

The bill was framed for the purpose of setting aside

21 Feb 1861

MORNINGTON v. MORNINGTON.

THIS was a motion for production. The bill stated separation articles of the 21st of June, 1834, by which the late Earl of *Mornington* agreed to secure an annuity of £1,000 to the Countess of *Mornington*, who was separated from him.

The Plaintiff, the present Earl, on attaining twenty-one, by a deed of the 15th of December, 1834, concurred in charging certain settled estates with payment of the debts of the late Earl (in ignorance, as he alleged, of the aforesaid agreement), by which deed a power was reserved to the late Earl of appointing a jointure of £1,500 to the Countess.

In 1839, the Countess filed her bill for specific performance of the agreement of June, 1834, and that the same might be effectuated by an appointment under the deed of December, 1834; and, ultimately, an appointment was made under the decree of the Court, on the 28th of December, 1853, of an annuity of £1,000 to the Countess,

this deed; and among the communications as to which privilege was claimed were letters dated a considerable time before the transaction which the bill sought to set aside, but which the Defendant, in her answer, described as having been written for the purpose of obtaining professional assistance as to, and with a view to, her defence against any claim that the Plaintiff might make against her. It appeared, however, on the face of the bill and answer, that a contest had previously existed as to matters intimately mixed up with the transaction which the bill sought to set aside—*Held*, that, under these circumstances, the dates were not sufficient to rebut the privilege claimed.

The Defendant was interrogated as to the instructions given to her solicitor for the above-mentioned deed, and also as to communications with reference thereto between herself or any persons on her behalf, and any persons acting on behalf of the grantor of the jointure. In her answer she ignored "save as herein and in the schedule hereto appears." By a subsequent clause as to documents generally, she claimed privilege for letters written by and to her solicitor; but in other parts of the schedule, as to which privilege was not claimed, were some documents which might satisfy the description of communications with third parties—*Held*, that the form of the answer was no bar to the privilege claimed. And *semble*, that, even if there had been no documents mentioned in the schedule free from the claim of privilege to answer the description of the communications with third parties inquired after, this would be only ground for exceptions, and not for production of the documents as to which privilege was claimed.

Macintosh v. Great Western Railway Company distinguished.

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for her life; but the same was to be without prejudice to the rights of any person other than the late Earl.

The bill stated that the Countess, by threatening to proceed to a sale of certain interests of the late Earl under an order in the said suit, induced the Earl to execute another jointure-deed, dated the 4th of February, 1854; and that her solicitor had previously, by her instructions, prepared an agreement and an indenture both of the 4th of February, 1854, by which a jointure of £1,500 was secured to the Countess; and that she instructed her solicitor to prepare, and that he did prepare, the deed.

The bill alleged that this appointment, not having been made to provide for the Countess, but to avert the sale of other property of the late Earl, was a fraud on the power.

The bill sought to set aside the deed of the 28th of December, 1853, so far as it purported to be an execution of the jointuring power, and the deed of the 4th of February, 1854, as a fraudulent execution of the power.

In the course of previous litigation, the Plaintiff had disputed the right of the Countess under the agreement of 1834 to the £1,000 annuity.

The Countess was interrogated as to the instructions for, and as to communications with, her solicitor and other persons relating to, and as to the circumstances of the preparation of, the deed of the 4th of February, 1854, and also generally as to documents.

The answer of the Defendant contained the following paragraphs :

85. I had not any communication whatever, either verbally or by letter, with the late Earl; and, *save as herein and in the schedule hereto appears*, I am unable to set forth

as to my knowledge, remembrance, information, or belief, or otherwise, what instructions I or any person or persons previously, or with reference to the preparation of the said agreement and indenture, dated respectively the 4th of February, 1854, or what communications or communication, either verbal or in writing, passed between me or any person or persons acting on my behalf, and any person or persons acting on behalf of the late Earl, with reference to the said agreement and indenture, dated respectively the 4th of February, 1854, or either of them, or to the preparation of such agreement and indenture or either of them, either previous or subsequent to the execution by the said late Earl of such agreement and indenture or either of them.

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118. I have, in the schedule to my answer annexed, set forth a full, true, and particular list or schedule of all such particulars as are in and by the 45th interrogatory enquired after. Such of the same documents as are contained in the first part of the said schedule consist of divers letters from and to my solicitor, which have been written for the purpose of obtaining professional advice and assistance for my guidance as to any claim which might be made against me by the Plaintiff, and with a view to my defence against any such claim; and I submit and humbly insist that I am not bound, and ought not to be compelled, to produce the same, or the papers and proceedings in the second part of the same schedule contained.

Paragraph 119 denied possession, "save as herein and in the schedule appears," of any documents relating to the matters in question in this suit or any or either of them, or from which, if produced, the truth of such matters or any or either of them would appear.

Some of the letters between the Defendant and her

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solicitor, enumerated in the first part of the schedule, were dated a considerable time before the transaction which the bill sought to set aside.

The part of the schedule as to which privilege was not claimed, contained some documents which might answer the description of communications with third parties mentioned in the 85th paragraph of the answer.

Argument.

Sir *H. Cairns*, Q.C., and Mr. *Nalder*, for the Plaintiff moved for production of the documents (among others) comprised in the first part of the schedule.

The Defendant, in paragraph 85, has answered an interrogatory by reference to certain scheduled documents, and, having made them part of her answer, cannot refuse production. Even if she would have been entitled to set up privilege as a reason for not answering the interrogatory, she has not done so, and, having elected to answer by reference, cannot make the answer nugatory by claiming privilege for the documents referred to: *Macintosh v. The Great Western Railway Company*(a), *Hardman v. Ellames*(b).

Another ground is, that the bill alleges fraud, and no privilege exists to cover fraud: *Gresley v. Mousley*(c), *Follett v. Jefferyes*(d), *Gartside v. Outram*(e), *Russell v. Jackson*(f).

Moreover, the date of the communications sought after is sufficient evidence on the face of the answer that they could not have been made after the dispute had arisen, and therefore that they are not privileged.

(a) 1 M. & G. 73.

(b) 2 M. & K. 745.

(c) 2 K. & J. 288.

(d) 1 Sim. N. S. 1.

(e) 5 W. R. 35.

(f) 9 Hare, 387, 392.

Mr. *Rolt*, Q.C., Mr. *Freeling*, and Mr. *Lea*, for the Defendant:—

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Argument.

The present suit is part of a contest which has been the subject of litigation for a long time, the Plaintiff having disputed successively the claim to any jointure at all, on the ground that the grant was improperly obtained, and then the claim to the larger amount. All communications between the Defendant and her solicitor relating to this contest are, therefore, privileged, whether before or after the actual commencement of this litigation; and it is sworn that these documents relate to advice taken to resist any claim which the Plaintiff might make.

If the communications do not relate to the subject of the present contest, they are irrelevant; if they do, they are privileged: *Pearse v. Pearse (a)*, *Follett v. Jefferyes (b)*, *Dendy v. Cross (c)*, *Ford v. De Pontes (d)*.

Hardman v. Ellames does not apply; because our claim to privilege in paragraph 118, extends back to paragraph 85; and, reading the two together, is a claim of privilege in respect of the interrogatory as to what passed as well as in respect of the documents.

In *Mackintosh v. The Great Western Railway Company* the Defendant answered matters which he was bound to answer, by reference to the schedule. We have answered by reference to the schedule only as to privileged matters, and our claim of privilege covers the whole.

As to the charge of fraud there is no charge that these documents were instruments by which any fraud was concocted.

(a) 1 D. G. & Sm. 12.

(b) 13 Jur. 972.

(c) 11 Beav. 91.

(d) 7 W. R. 299.

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[They also cited *Inman v. Whitley* (a), *Wigram* on Discovery (b), *Latimer v. Neate* (c), *Glover v. Hall* (d).]

Sir *H. Cairns*, in reply, insisted that the case was on all fours with *Macintosh v. The Great Western Railway Company*.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Three questions have been raised in the argument on this motion : first, whether there is not in the bill a charge of fraud sufficient to take the documents inquired after out of the ordinary rule of privilege; secondly, whether there is not from the dates sufficient evidence that the communications were made at a time when they could not be privileged; and thirdly, a question of some consequence, whether the form in which the answer is framed is such as to give protection to these documents.

On the question of fraud it is clear, that there is no charge of fraud at all approaching that which occurred in *Follett v. Jefferyes*, that is to say, no such charge of fraud with reference to that part of the case to which the documents in dispute relate.

The fraud charged is, that the Countess threatened to assert certain rights over the property of the Earl, and by that pressure obtained from him the execution in her favour of the jointuring power. It is not averred that the solicitor took any part in the fraudulent proceeding, all that is alleged with respect to him being that he was instructed to prepare a deed, and that he did prepare it. In *Follett v. Jefferyes*, Lord *Cranworth* observed, that the transaction

(a) 4 Beav. 548.
 (b) Sect. 205.

(c) 4 Cl. & F. 570.
 (d) 2 Ph. 484.

might not be a very moral act, but that there was nothing stated as to which it was not perfectly lawful for the client to ask, and for the solicitor to give, professional advice.

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The fraud charged in this bill is a matter entirely collateral to the communications with the solicitor; and there is nothing whatever to bring these documents within the rule, that, where a fraud is concocted between a solicitor and his client, the doctrine of privilege does not extend to protect the communications by which it is effected.

The next point, as to the date of the instrument, appeared at first sight plausible. The deed is in February, 1854; and one of the letters for which privilege is claimed, is dated on the 18th December, 1853, before the particular subject of litigation to which the bill is directed—the alleged fraud in procuring the deed—had arisen. But upon the whole answer it is apparent that the arrangement in 1854 was founded on previous transactions, and had some relation to the earlier jointure deed of 1834, which the Plaintiff in this suit has questioned, on grounds mixed up with those which are prominently put forward in the present bill. In the answer, the Defendant describes the letters, as to which privilege is claimed, as having been written for the purpose of obtaining professional advice and assistance for her guidance as to any claim which might be made against her by the Plaintiff, and with a view to her defence against any such claim.

I apprehend that that statement is a perfectly good defence against the production of any document so described, unless it can be shown that there was such fraud as would take the document out of the reach of privilege, or unless it appears manifest from the rest of the answer that the statement cannot possibly be true; for I am not

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obliged to give credit to one statement in an answer when it is contradicted by another.

On the particular paragraph of the answer, one would be inclined to say that letters of the dates set forth could not come within the description given of the scheduled documents; but, on looking through the whole bill and answer, there is evidence of hostile proceedings intimately mixed up with the transactions which this bill seeks to impeach, and, therefore, it may well be that communications with reference to defence against these former proceedings may have an important bearing on the defence of the present suit; and for this reason, especially, that the Defendant anticipated future proceedings by the Plaintiff, such as he has now taken, and her communications at that time may well have been confidential with reference to the matters on which she expected litigation.

The case is open to the observation of the Master of the Rolls in *Ford v. De Pontes*, that if the communications are relevant they must of necessity be privileged.

The remaining question arises out of the form of the 85th paragraph. No difficulty would have arisen but for the reference it contains to communications other than the instructions and letters to her solicitor as to the deed of February, 1854; because, if the answer had been confined to the instructions, and had run thus—"Save as appears herein and in the schedule, I cannot say what instructions I gave for the preparation of the deed;" this, coupled with the subsequent claim of privilege for documents, would be the same in effect as if the whole had been put in one clause in this way—"Save as appears by scheduled documents, which I decline to produce, I cannot answer." That, I think, is a perfectly legitimate way of answering; and it is hypercriticism to say that she has answered by

reference, and, therefore, must answer fully, because the whole answer taken together is this, "I can only answer by reference to certain letters, and those letters are privileged." The instructions, therefore, are clearly privileged, and are not touched by the doctrine of *Macintosh v. The Great Western Railway Company*. The difficulty arises from the fact that the interrogatory inquires—not only as to the previous instructions to the Defendant's solicitor, but also as to all communications between the Defendant and any persons on her behalf, and any persons acting on behalf of the Earl, whether previous or subsequent to the execution of the agreement. To this the answer is, that she cannot say, save as appears in the answer and the schedule.

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The comment made upon this in argument ran thus :—
"You say, as to facts upon which you are bound to answer, that you do answer by reference to the schedule; and then you claim privilege for the documents to which you refer as constituting your answer." But I think I am justified in construing the answer in this way :—"I cannot answer you either as to those facts which I am not bound to communicate, or as to those which I am bound to communicate, except by reference to the schedule." If there were nothing in the schedule to answer the description of communications with third parties, except in the part as to which privilege is claimed, there would be ground for saying that the documents set out as privileged must contain these unprotected communications. But there are in the other part of the schedule communications with third persons mentioned, which may be construed as the subjects of reference in the part of the 85th paragraph which relates to third persons. Even if this were otherwise, the proper view would rather be to consider the answer insufficient, because it meets a question which ought to be answered only by a reference to privileged documents. But insufficiency

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is not a ground for production. If a Defendant says, *I can only answer to the same effect as a particular letter*, but that was to my solicitor, and I decline to produce it, the proper course is to except to the answer given by reference to a privileged document, for to decline to produce it is to give no answer. If the document is withheld the information must be given, or the answer is insufficient.

The great distinction between this case and *Macintosh v. The Great Western Railway Company* is, that the answer of the railway company contained an offer to produce the documents referred to. It was impossible, therefore, to except; and the Plaintiff, in fact, accepted this offer and claimed production, notwithstanding privilege was set up as to part of the documents by a subsequent clause of the answer. Here all that is said is, "Something may be found in certain privileged documents, but beyond that I can give no answer." The Defendant clearly cannot insist on the protection given to certain documents to relieve herself from answering fully; but I think that this argument, however good upon exceptions, is not available on a motion for production of privileged documents.

6 64. 18
789293
38 B. 2. 140.
1 523 Ju H 618

1862.

November 9th
& 10th.

Will—Election
—Devise by
part Owner.

A testator,
being entitled
to a moiety of

two farms, *T.* and *P.*, of which one-fourth belonged to *W.*, and the remaining fourth to *L.*, gave all his real and personal estate to his wife for life, with remainder to *L.* for life, and from and after his decease devised his farm *T.* to *W.* and *E.*, and gave them £200 towards rebuilding and repairing the buildings thereon, and devised his farm *P.* to the Plaintiffs. After the testator's death *L.* conveyed all his interest in the two farms, upon trust for himself and the testator's widow successively for life, with remainder upon trust for the Plaintiffs. *L.* died in the lifetime of the widow, who died shortly before the filing of the bill:—*Held*, that *W.* was put to his election. *Held*, also, that, in the events which had happened, *L.* and the Plaintiffs, as assignees of his interest, were not put to their election.

HOWELLS v. JENKINS.

WILLIAM JENKINS (since deceased), by his will, devised two freehold messuages and farms, known as *Tyr-y-wain* and *Pedola*, to a trustee, upon trust to apply the rents for the maintenance of his wife, his reputed son, *Llewellyn*

Jenkins, and his sons *Lewis* and *Rees Jenkins*, and on the youngest attaining twenty-one to convey the same to the then survivors of the widow, and the said *Llewellyn*, *Lewis*, and *Rees Jenkins* as tenants in common in fee.

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 Statement.

The testator died in 1810. *Lewis Jenkins* was his heir-at-law, and *Rees Jenkins* attained twenty-one in the lifetime of the widow. The widow died in 1817, intestate, leaving *Lewis Jenkins* her heir at-law.

The bill alleged, that from that time the rents were received exclusively by *Lewis* and *Llewellyn*, who lived together, *Rees Jenkins* having been compensated out of other property; and that he and those claiming under him made no claim until the year 1858. This however was denied.

Rees Jenkins died in 1832 intestate, leaving two children, the Defendants *William* and *Elizabeth Jenkins*.

Lewis Jenkins made his will, dated January 27th, 1847, as follows:—"I give and bequeath unto my dear wife, *Ann*, all my household furniture, plate, linen, china, and household stores in and about my dwelling-house until her decease or second marriage, whichever shall first happen; and from and immediately after her decease or second marriage, I give the same to and amongst such persons as she shall by her will or by any testamentary instrument direct. All other my real and personal estate, money, securities for money, and other property whatsoever which I may die possessed of, I give, devise, and bequeath the same unto my said wife until her decease or second marriage, whichever shall first happen. And I direct that she may receive the rents of the leaseholds, and the interest of all moneys out upon security, without being liable to have the said leaseholds sold and the proceeds invested, or the said money called in and invested on any

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other than their present security, or other personal security in pursuance of any rule in Equity; and from and after her decease or second marriage, I give, devise, and bequeath the same unto my brother *Llewellyn*, for and during his natural life; and the rents and interest aforesaid to be received by him in the same manner as I have directed with respect to my said wife. And from and after his decease I give, devise, and bequeath my property in manner following: that is to say, as to my farm called *Tyr-y-wain*, I give and devise the same unto and between my nephew *William Jenkins* and my niece *Elizabeth Jenkins* (the Defendants), and their several heirs and assigns for ever, as tenants in common. And I direct that in case either my nephew *William* or my niece *Elizabeth* shall die without leaving lawful issue at the time of his or her death, the share of the one so dying shall go to the other of them, his or her heirs and assigns for ever. And I give and bequeath unto and between my said nephew *William* and my niece *Elizabeth* the sum of £200, towards rebuilding and repairing the house, outhouses, and other buildings on my said farm, *Tyr-y-wain*. And as to my farm called *Pedola*, and my two leasehold houses at *Dowlais*, I give and devise and bequeath the same unto my nieces, *Ann Jenkins* and *Jennett Jenkins* (the Plaintiffs), now living with me, and to their several heirs, executors, administrators, and assigns, according to the nature of the property, as tenants in common. And I direct that in case either my niece *Ann* or my niece *Jennett* shall die without leaving any lawful issue living at the time of her death, that the share of the one so dying of the said farm and houses shall go to the other of them, her heirs, executors, administrators, and assigns. I give and bequeath unto *Mary Davies*, wife of *William Davies*, the sum of £100; and £50 to *Mary Williams*, wife of *John Williams*. And I direct that these legacies, and the legacy of £200 hereinbefore given, shall

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be paid in three months after the death of the survivor of my said wife and *Llewellyn Jenkins*. All the net residue and remainder of my said real and personal estate whatsoever and wheresoever, I give, devise, and bequeath, after the decease or second marriage of my said wife and the death of the said *Llewellyn Jenkins*, unto and between my said nephew and nieces, *William, Elizabeth, Ann, and Jennett*, their several heirs, executors, and administrators, share and share alike. And I appoint my dear wife *Ann*, and the said *Llewellyn Jenkins*, executor and executrix of this my will."

Lewis Jenkins died shortly after the date of the will and before the execution of the deed next mentioned.

By a deed dated September 28th, 1847, *Llewellyn Jenkins* conveyed all his interest in the two farms of *Tyr-y-wain* and *Pedola* to *Ann Jenkins* and her heirs, to the use of *Llewellyn* for life, with remainder to the use of the said *Ann Jenkins* for life, with remainder to the Plaintiffs as tenants in common in fee; but if either should die without leaving lawful issue living at the time of her death, her share was to go to the survivor.

The bill stated that this deed was an election by *Llewellyn* to take against the will of *Lewis*. The Defendants alleged that *Llewellyn Jenkins* was of unsound mind when he executed the deed; but there was strong evidence to the contrary.

Llewellyn Jenkins died in the lifetime of the widow *Ann Jenkins*, intestate, and without issue. *Ann Jenkins* died in November, 1858.

The Plaintiffs claimed, under the deed of September 28th, 1847, all the interest of *Llewellyn*—viz., one fourth of *Tyr-y-wain* and *Pedola*; and, under the will of *Lewis*, the re-

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mainder of *Pedola*, in case the Defendant *William* should elect to take under the will of *Lewis*; or if he should elect to take against the will, then they claimed compensation out of the one-fourth of *Tyr-y-wain* devised to *William*.

The legal estate was outstanding.

The bill prayed that the Defendant *William Jenkins* might be ordered to elect whether to take under or against the will of *Lewis*, and for possession of *Pedola*, and of one-fourth of *Tyr-y-wain*, and for an account of past rents.

Argument.

Mr. *James*, Q.C., and Mr. *Freeling*, for the Plaintiffs :—

William Jenkins is bound to elect whether he will take under or against the will of *Lewis*. If he elects to take under the will, he must allow the whole of *Pedola* to go to us, together with one-fourth of *Tyr-y-wain*, which we take by conveyance from *Llewellyn*. If he elects against the will he must give up the one-fourth of *Tyr-y-wain*, which he takes under the will as compensation. It is now clearly settled, that a case of election may be raised although the testator may have had a partial interest in the subject-matter of the gift: *Padbury v. Clark*(a), *Fitzsimons v. Fitzsimons*(b). Here there is the special circumstance of £200 being given for the repairs of *Tyr-y-wain*, which shows conclusively that the testator was dealing with the entirety of the farms.

Mr. *Willcock*, Q.C., and Mr. *Hobhouse*, for the Defendants :—

In the first place, we have a counter case of election against the Plaintiffs. They are claiming one-fourth of *Tyr-y-wain* by conveyance from *Llewellyn* in opposition to the will, and they must give this up if they insist on taking

(a) 2 M. & G. 298.

(b) 28 Beav. 417.

Pedola under the will. The bill states that *Llewellyn* elected to take against the will, and the Plaintiffs claiming under him are parties to that election.

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Argument.

But, in truth, there is no case of election at all. The testator had property,—namely, a moiety of each farm—sufficient to satisfy the words of the will; and that being so, there is no election: *Rancliffe v. Parkyns* (a), *Dummer v. Pitcher* (b).

[The VICE-CHANCELLOR mentioned a case of *Chave v. Chave* (for which see note at page 713 *inf.*), in which Sir *J. Leach* had held that there was no case for election, on the ground that the testator was part owner of the property.]

Mr. *James* in reply.—The subsequent cases, especially *Padbury v. Clark* and *Fitzsimons v. Fitzsimons*, must be considered as overruling Sir *J. Leach's* decision.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

November 10th.
—
Judgment.

The object of this suit is to compel the Defendant *William Jenkins* to elect whether to take under or against the will of *Lewis Jenkins*, who died in 1847.

The will is dated on the 27th of January, 1847, at which time the Defendant *William Jenkins* was entitled, as heir of his father *Rees Jenkins*, to one fourth of the farms of *Tyr-y-wain* and *Pedola*, *Llewellyn Jenkins* to another fourth, and the testator to the remaining moiety.

Putting aside for the moment the question of election raised in the suit, and assuming the will to operate upon what the testator actually possessed, the result would be this:—*William* would take one-fourth of *Tyr-y-wain* under

(a) 6 Dow, 149.

(b) 2 My. & K. 262, 274.

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the will, and another fourth as his own; *Elizabeth* would take one-fourth under the will, and the remaining fourth would go to *Llewellyn* or his assigns. With respect to *Pedola*, the Plaintiffs would take a moiety under the will. *William* would have one-fourth as his own, and the remaining fourth would belong to *Llewellyn* and his assigns. *Llewellyn's* interest has passed to the Plaintiffs under a deed dated the 28th of September, 1847, which, of course, I must treat as a valid instrument, no attempt having been made to set it aside. I should add, that this interest passed to the Plaintiffs free from any question of election as against *Llewellyn*, inasmuch as the life interest given to *Llewellyn* by the will failed by his death in the lifetime of the previous tenant for life, and *Llewellyn*, consequently, took nothing under the will. The mere fact that the Plaintiffs are assignees of *Llewellyn*, whose property the testator attempted to deal with, does not in any way put the Plaintiffs to election as regards an interest given by the will, not to *Llewellyn*, but to themselves.

The effect, therefore, of the will and the deed, apart from the question of election which is raised against the Defendant *William*, would be, that the Plaintiffs would take three-fourths of *Pedola* and one-fourth of *Tyr-y-wain*; *William* would take one-fourth of *Pedola* and a moiety of *Tyr-y-wain*; and *Elizabeth* would take one-fourth of *Tyr-y-wain*. If, on the other hand, *William* is bound to elect, and should elect to take under the will, the whole of *Pedola* must pass to the Plaintiffs, in addition to their fourth of *Tyr-y-wain*.

The question of election raised by the bill depends upon this question of construction—whether the testator has used words which must be read as intended to pass the entirety of *Pedola*, or whether, having regard to the fact that he was only entitled to a moiety, the devise can be construed as a gift only of such interest as he had.

The difficulty of sustaining a case of election is always much greater where the testator has a partial interest in the property dealt with, than where he purports to devise an estate in which he has no interest at all. Where the testator has some interest, the Court will lean as far as possible to a construction which would make him deal only with that to which he was entitled. The testator being entitled to a moiety of *Pedola*, it is reasonable to read his will, if the language will in any way admit of it, as a disposition only of the moiety which belonged to him; and I have felt some difficulty on this point, in consequence of a decision of Sir *J. Leach*, in an unreported case of *Chave v. Chave* (a), in which I was counsel. I remember, how-

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 Judgment.

33 B. & C. 127 (a) CHAVE v. CHAVE.
 (Rolls, May 17, 1830.)

Richard Chave the elder, upon the marriage of his son *Richard Chave* the younger, in 1803, concurred in settling, by indentures bearing date in that year, a moiety of certain messuages, lands, and tenements called *Shepherd's*, *Reed's*, *Hurford's*, and *Clotworthy's*, to the use of himself for life, with remainder to the use of *Richard Chave* the younger for life, with remainder to trustees for a term of years, to secure a jointure of £100 per annum to the intended wife, with remainder to the use of the children of the marriage, in such manner as the husband should appoint; and in default of such appointment, in such manner, proportions, &c., as the wife should appoint. Some time after this settlement, *Richard Chave* the elder purchased the other moiety of the estates called *Shep-*

herd's, *Reed's*, *Hurford's*, and *Clotworthy's*, and took a conveyance of them to himself in fee simple. *Richard Chave* the younger died in the lifetime of his father, leaving his widow and two children, *Richard Chave* and *Mary Cook*, Defendants in the present suit, him surviving. *Richard Chave* the elder, by his will, bearing date in the year 1825, devised all his messuages, lands, farms, and tenements, called *Shepherd's*, *Reed's*, *Hurford's*, *Clotworthy's*, *Halsford*, *Prime Mead*, and *Noble Hindcome*, of all which the testator declared that he was seised in fee simple; and all his messuages, farm, and lands called *Ven*, situate in the several parishes of *Halberton* and *Chief Linman*, to the use of his wife *Elizabeth Chave* (one of the Plaintiffs) for her life, she keeping the same and the buildings thereon respectively in good re-

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ever, that I felt some doubts about the judgment at the time ; and I confess that it appears to me now to be not only ques-

pair and insured against fire ; with remainder, as to *Shepherd's*, *Reed's*, *Hurford's*, *Clotworthy's*, and *Halsford*, to the use of trustees for 500 years, with remainder to the use of *John Cowlen* in fee, in trust for *John Chave* (the other Plaintiff) in fee. And the trust of the term of 500 years was declared to be for the purpose of raising £400 for the benefit of *Mary Cook* after the death of *Elizabeth Chave* ; and a power of distress was given to *Mary Cook* on the premises comprised in the term. The testator gave other benefits by his will to *Mary Cook*, and also certain freehold estates to the Defendant *Richard Chave*, her brother.

The bill was filed to carry into execution the trusts of the will, and also to raise the question whether the Defendants *Richard Chave* and *Mary Cook* were not bound to elect between the benefits provided for them by the settlement and by the will, upon the ground that the testator had indicated a sufficient intention to pass the whole of the premises, including the settled moiety, and not only the moiety of which he was seised in fee.

The answers stated that the mother of the Defendants, *Richard Chave* and *Mary Cook*, had appointed the settled moiety to the use of the Defendant *Richard Chave* in fee, charged with £200, to be paid to *Mary Cook*.

Mr. *Bickersteth* and Mr. *Wood* for the Plaintiffs :—

The testator devises the estates, a moiety of which was comprised in the settlement, together with other estates, of the entirety of which he was seised in fee, and applies the same description to the whole,—namely, “of all of which I am seised in fee simple.” The settlement was made more than twenty years before the date of his will ; and by the settlement he was in possession of one moiety as tenant for life ; so that, having the whole in his own occupation, he may naturally have forgotten the settlement, and supposed that he was entitled to the entirety in fee. The direction to his widow to repair and insure the buildings on all the premises, clearly implies the testator's intention of passing the entirety (*Birmingham v. Kirwan*, 2 Sch. & Lef. 444). Lord *Eldon* has observed, that it is difficult to establish a case of election where the party is entitled to any disposable interest in the premises ; but the case of *Blake v. Bunbury*, 4 B. C. C. 21, is a strong decision on the point of election, notwithstanding the actual fee simple of the estate was vested in the testator, subject to a charge created by a settlement, of which very settlement he takes express notice in his will. The reasoning of Sir *W. Grant* in *Welby v. Welby*, 2 Ves.

tionable on principle, but inconsistent with the later authorities. The testator in that case had settled a moiety of certain houses and lands, subject to a life interest reserved to himself, upon his son and the issue of his marriage. Having afterwards purchased the fee-simple of the other moiety, he devised the houses and lands, together with other property, upon trusts for the benefit of the children of his son (the son himself having died in the testator's lifetime). This raised the question, whether those children were put to their election between the will and the settlement, or whether the devise ought to be read as intended to apply only to the moiety to which the testator was absolutely entitled. Sir *J. Leach*, without hearing the defence, held

& B. 187, as to the *Sapperton* estate, in which the testator had a reversion in fee, is particularly applicable to the principal case. It was disposed of, together with other estates, as is the case here, over which the testator had an absolute control, and that was remarked upon as one of the circumstances evidencing the intention. The term of 500 years, also, is here created for the purpose of raising £400 out of the premises in question, for the benefit of *Mary Cook*, who, if she be not put to her election, is entitled to a considerable interest already by the settlement; and a power of distress is given her, a circumstance which has been considered as evidence of an intention to exclude dower. It is remarkable, also, that in the settlement of his property, the testator devises other real estates to his heir, and not those to a moiety of which he was already entitled; but the direction as to

the repairs is, we consider, of itself a decisive proof of the testator's intention, of which the other circumstances are corroborative.

Mr. *Tinney* and Mr. *Sandys* for the Defendants, *Richard Chave* and *Mary Cook*, were stopped by the Court.

MASTER OF THE ROLLS SIR J. LEACH :—

I do not consider this to be a case of election. The direction as to repairs would be of considerable weight, if confined to the settled premises; but it is applied to the property generally; and I think, that, *reddendo singula singulis*, it must be considered as a direction to repair the premises, to the entirety of which the testator was entitled.

The usual decree was taken for establishing the will. The costs of all the parties to be paid out of the personal estate.

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—
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that there was no case of election, and considered that a direction to repair, which in terms extended to the whole subject of devise, might be read *reddendo singula singulis*, as applying only to the other premises included in the devise, the entirety of which belonged to the testator.

The decision always struck me as a very strong one, the direction to repair being in terms applied to the whole property which was the subject of devise, and being by Sir *J. Leach's* decision reduced to a nullity with respect to the testator's moiety of the land comprised in the settlement.

More recent authorities have gone further in the opposite direction. In *Parbury v. Clark* there was a direction to repair, and Lord *Cottenham* held that circumstance, coupled with the fact that the testator by an independent clause showed that he knew how to deal correctly with property of which he was only part owner, sufficient to raise a question of election.

The case of *Fitzsimons v. Fitzsimons* before the Master of the Rolls is still stronger; because there was nothing more in that case than a simple gift of "my messuage and estate at *Goose Green*," the testator being in fact entitled only to a moiety. It was held, nevertheless, that the claimants of the other moiety were put to their election. In the case before me, the testator, being entitled to a moiety of *Tyr-y-wain* and *Pedola*, by his will devises and bequeaths all his real and personal property to his wife during widowhood, with remainder to *Llewellyn Jenkins* for life, and proceeds thus:—"From and after his decease I give, devise, and bequeath my property in manner following, that is to say—As to my farm called *Tyr-y-wain*, I give and devise the same unto and between my nephew *William Jenkins* and my niece *Elizabeth Jenkins* and their

several heirs and assigns for ever, as tenants in common ;" and this is followed by a gift over to the survivor in the event of either dying without issue.

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So far the case would be clearly within the decision at the Rolls, there being a gift of an estate without the slightest reference to the fact that the interest of the testator was only an undivided moiety.

The next clause greatly strengthens the construction for which the Plaintiffs contend. It is a gift to *William* and *Elizabeth* of a sum of money towards rebuilding and repairing the premises at *Tyr-y-wain* ; and though it is true there is no similar provision as to *Pedola*, it is difficult to deal differently with the two devises.

William, one of the devisees of *Tyr-y-wain*, was himself entitled to a quarter of the estate ; while *Elizabeth* had no interest in it at all ; yet the testator, without making the least distinction between them, devises the estate to them in moieties, and gives them a sum of money to lay out upon property, of which one quarter was in *William* and another quarter outstanding in *Llewellyn*.

If *Tyr-y-wain* had been the subject as to which the question of election was raised, I think even Sir *J. Leach* would have considered such a direction for repairs as I find here, conclusive in favour of the construction that the testator meant to dispose of the one entire estate known as the farm of *Tyr-y-wain*.

If that be the sound conclusion, I think it is impossible to give a different construction to the devise of *Pedola*, which is precisely the same in form, except that it is not followed by the direction to repair.

Some stress was laid on the intimation of the testator's desire to dispose of his own property : but this amounts to

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 —
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very little; for no testator can be presumed to intend wilfully and knowingly to dispose of that which is not his.

I hold, therefore, that the Defendant *William* is put to his election; and it becomes unnecessary to discuss the question which was raised as to the Statute of Limitations.

1829. 12-1. 347
 31 Bea 450
 144 In 748.

MAUNDER v. LLOYD.

Nov. 21st, 24th.

Jurisdiction—
 Foreign Firm
 —Winding-up
 —Accounts.

AT and prior to the 1st of January, 1855, *Edward Lloyd* was carrying on business at *Liverpool* under the firm of *Edward Lloyd & Co.*

A., a resident in *England*, and the sole member of a *Liverpool* firm, entered into a partnership with *B.* and *C.*, residents in *Hayti*, in a business to be carried on at *Hayti*. The *Liverpool* firm acted as the agents of the *Haytian* firm. *B.* was admitted as a partner in the *Liverpool* firm. *C.* died, and the winding-up of the *Haytian* firm was committed by agreement to *A.* and *B.* Then

A. died, leaving *B.* sole survivor in each firm. *B.* and the *Haytian* legal representatives of *C.* engaged in cross suits in *Hayti*, in which certain settled accounts were established. The representative of *A.*, whose assets were all in *England*, was not a party to the *Haytian* suit.

Held, on a bill filed by the administrator of *C.* in *England*, that there was jurisdiction in the Court of Chancery to wind up the partnership in *Hayti*, and to take the accounts of that firm and of the agency of the *Liverpool* firm; and decree accordingly.

Held, also, that the law of *Hayti* was to regulate the transactions of the *Haytian* firm.

It appeared that the stipulation as to copies had only been partially complied with.

In 1857 *William Lloyd* was admitted as a partner in the *Liverpool* firm.

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Statement.

On the 17th September, 1859, *Julius Gaetjens* died at *Port-au-Prince* intestate, leaving the Defendant *Leonie Gaetjens* his widow, and several children; and the said *Leonie Gaetjens* was shortly afterwards duly constituted the legal personal representative of *Julius Gaetjens*, according to the law of *Hayti*.

Julius Gaetjens was a native of *Bremen*, not an *English* subject or domiciled in *England*, and had resided for many years up to his death in *Hayti*. *Leonie Gaetjens*, the widow, was a native of *Hayti*, domiciled there. *William Lloyd* was an *Englishman*, who had resided in *Hayti* since 1841, and was still resident there.

On the 4th of April, 1860, an agreement was entered into between *Edward Lloyd*, *William Lloyd*, and an attorney duly appointed by *Leonie Gaetjens* to act for the succession of the late *Julius Gaetjens*, and was executed at *Port-au-Prince* by *William Lloyd* on behalf of himself and his brother, and by the attorney for the widow.

This agreement contained clauses to the following effect :—

1. That the agreement should form the basis for the liquidation of the affairs of the *Haytian* firm, which expired on the 31st December, 1859, by the death of *Julius Gaetjens* in the previous September.

2. That *Edward Lloyd & Co.* should conduct the winding-up of the affairs of the *Haytian* firm in liquidation, on payment of £5 per cent. commission on gross sales and

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remittances to the *Liverpool* firm from the 1st of January, 1860.

5. That to equalise the receipts of *Edward Lloyd*, *William Lloyd*, and the widow *Gaetjens*, from the 17th September to the 31st December, *Edward Lloyd* should receive 18,348 dollars and £265 4s. 4d., and *William Lloyd* £265 4s. 4d.

6. That within a month 100,000 dollars should be paid to each of the parties interested—viz. *Edward Lloyd*, *William Lloyd*, and the succession of the late *Julius Gaetjens*.

11. That on the closing of any account figuring in the balance-sheet drawn on the 31st of December, 1859, and accepted as correct by all parties interested, a detailed statement of each account will be presented to *Edward Lloyd*, *William Lloyd*, and to the succession of the late *Julius Gaetjens*.

12. That a copy of the balance-sheet is to be furnished to each of the above-mentioned parties every six months, closed on the 1st of January and the 1st of July every year, until the final liquidation.

On May 16th, 1860, *Edward Lloyd* died, and his will was proved by his widow, the Defendant *Agnes Lloyd*.

On July 3rd, 1860, letters of administration to *Julius Gaetjens* were granted by the Court of Probate to the Plaintiff, as the attorney of *Leonie Gaetjens*.

The business of the *Haytian* firm had consisted chiefly of shipments of coffee and mahogany, the latter being obtained from forests belonging to the firm, which could only be advantageously realised by continuing the trade for some years after the dissolution of the firm.

Proceedings had been instituted in the courts of *Hayti* by the Defendant *William Lloyd* against *Leonie Gaetjens* and her children, under the agreement of April, 1860, and also on behalf of *Leonie Gaetjens*, for the purpose of opening the accounts therein referred to as settled, and annulling the agreement.

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The bill in Chancery was filed on 1st of March, 1861, and prayed for accounts of the *Haytian* partnership, and between the *Haytian* and *Liverpool* firms, and that the *Haytian* partnership might be wound up.

The Chancery proceedings were pleaded by the widow *Gaetjens* in bar of the *Haytian* suit; and on the 14th of June, 1861, the plea was overruled, on the grounds that the agreement of April, 1860, was binding; that by the partnership articles the accounts could not be opened beyond the balance-sheet preceding the death of *Julius Gaetjens*; and that the tribunals of *Port-au-Prince* were qualified to take cognisance of all suits relative to the firm of *Edward Lloyd & Co.*, seeing that its offices and the centre of its operations were in that city.

After other interlocutory proceedings, in the course of which the balance-sheet of July, 1859, was compared with the books, the *Haytian* Court, by a judgment dated the 7th of December, 1861, declared that the said balance-sheet was in conformity with the books.

Mr. *Giffard*, Q.C., and Mr. *Archibald Smith*, for the Plaintiff:—

Argument.

We ask for an account of all the dealings between the two firms, and of all the dealings of the *Haytian* firm inter se, with leave to surcharge and falsify settled accounts,

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but not otherwise to disturb them. The only defence set up is the pending proceedings in *Hayti*, but those proceedings do not go beyond what is equivalent to bill filed, and plea put in and overruled: there is no decree; and if there were, the representative of *Edward Lloyd* is not a party to that suit: *Ostell v. Le Page(a)*, *De la Viesca v. Lubbock(b)*, *Chambers v. Bicknell(c)*.

Mr. *L. Mackeson* for *Leonie Gaetjens*.

Mr. *Rolt*, Q.C., and Mr. *E. E. Kay*, for the Defendants *William* and *Agnes Lloyd*:—

The main object of this suit is to take the accounts of a firm in *Hayti*, under the following circumstances: The sole surviving partner of that firm, who is also by an irrevocable agreement appointed sole liquidator, is a domiciled *Haytian*, though by birth an *Englishman*; the place of business is in *Hayti*; all the property of the firm is there, and it principally consists of real estate there; all the books are there; all the necessary witnesses are resident there; all evidence concerning the dealings and transactions of the firm must be brought from thence; all questions which may arise between the partners must be decided according to *Haytian* law, and we have no evidence whatever as to what that law may be. The contract was made in *Hayti*, carried out in *Hayti*, and the business is now in course of being wound up under the supervision of the proper court there. There is not the slightest ground for surcharge or falsification of the accounts, and there is a binding agreement that these accounts should be treated as settled accounts. The business consists principally of felling and bringing to the coast the mahogany in extensive forests in the mountains of

(a) 5 De G. & Sm. 95; S. C., 2 D. M. & G. 892.

(b) 10 Sim. 629.

(c) 2 Hare, 536.

Hayti, which can only be done when the rivers are swollen, and will take many years of careful management to wind up advantageously. Even if there had been no proceedings in *Hayti* this would not be a proper case for exercising the jurisdiction of this Court; at the most, the decree cannot go beyond the agency accounts between the *Haytian* and the *English* firms. The rest is in every respect exclusively an *Haytian* matter. Then the fact, that the whole accounts are in course of being taken in the courts of *Hayti* is sufficient to induce this Court to stay its hand altogether, on the principle of *The Carron Iron Company v. M'Laren* (a). This Court, moreover, has no power to enforce any decree it may make, and there is no evidence as to what the law of *Hayti* is. It is possible that the representative of *Edward Lloyd* might object that she is not a party to the proceedings in *Hayti*; but she has not taken the objection, and it is not competent for the representatives of *Gaetjens* to make it a ground for proceedings here. And it is further to be considered, that the Plaintiff, claiming to be a creditor of the *Haytian* firm, cannot sue the debtors of that firm, viz. the *Liverpool* house, unless collusion is alleged between the surviving partners in *Hayti* and such debtors; and there is no such averment in the bill.

[They also cited on this point *Norris v. Chambres* (b), *Hendrick v. Wood* (c), *Kennedy v. Lord Cassillis* (d), *Jones v. Geddes* (e), *Story's Conflict of Laws* (f).]

With respect to the agency accounts, as to which alone there is any shadow of ground for jurisdiction, the agreements between the parties give *William Lloyd* absolute authority to settle them; and, though it may be said he

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| (a) 5 H. L. Cas. 416. | (d) 2 Swanst. 313. |
| (b) 29 Beav. 246, 253; S. C., | (e) 1 Ph. 724. |
| on appeal, 9 W. R. 794. | (f) Sect. 269. |
| (c) 9 W. R. 588. | |

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represents both debtor and creditor, his approval of the accounts is binding on the *Haytian* partners, until some evidence is given to impeach them. Here there is no allegation of any fraud, and no ground for surcharging and falsifying: *Chambers v. Goldwin(a)*, *Lawless v. Mansfield(b)*.

The VICE-CHANCELLOR asked whether it was desired, on the part of the Plaintiff, to argue that the agreement of April, 1860, was not to be governed by *Haytian* law?

Mr. *Archibald Smith* declined to argue the point.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case has been argued with much learning, on the question whether this Court has any jurisdiction, under the circumstances, to take the accounts of a partnership formed under a contract which was to be carried into effect in *Hayti*. But when I look at the nature of the contract of partnership, and the constitution of the firm, it is impossible to doubt that some relief ought to be granted here.

The circumstances are briefly as follows: a contract was entered into, in 1854, in *Liverpool*, between *Edward Lloyd*, *William Lloyd*, and *Julius Gastjens*, to become partners in a business to be carried on entirely in *Hayti*. At that time *Edward Lloyd* alone carried on business in *Liverpool*, under the firm of *Edward Lloyd & Co.* The *Haytian* firm adopted the same style, but was a distinct firm. It was part of the contract of partnership of the *Haytian* firm that *Edward Lloyd & Co.*, of *Liverpool*, should be their agents

(a) 5 Ves. 834; S. C., 9 Ves. 254. (b) 1 Dr. & War. 557.

in this country. A double ground of account arises out of this arrangement, *Edward Lloyd* being liable to account as an agent and also as a partner of the *Haytian* firm. In the year 1857 *William* was admitted as a partner in the *Liverpool* firm.

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In 1859 *Julius Gaetjens* died, and *Edward* and *William Lloyd* thereby became the surviving partners of the *Haytian* firm, being also the only members of the *Liverpool* firm. *Edward* and *William Lloyd* would, therefore, according to our law, be the proper persons to wind up the affairs of the *Haytian* firm; and the same rule seems also to be adopted by the *Haytian* courts. Consequently, in settling the agency accounts, they would, in fact, be accounting to themselves; and that circumstance must have been apparent on the execution of the agreement of 1860, which is now treated by all parties, as it was considered by the *Haytian* tribunals, as a binding arrangement.

That agreement was made between *Edward Lloyd*, *William Lloyd*, and *Louis Gaetjens*, acting for the succession of *Julius Gaetjens* in *Hayti*. It recites that the *Haytian* firm expired by the death of *Julius Gaetjens*, and provides for the winding up of its affairs in liquidation, as from the 1st of *January*, 1860, by the *Liverpool* firm at a commission of 5 per cent. on the gross sales and remittances. Then follow provisions for payments to be made on account to equalise the sums drawn by the different partners, the principal payment being to *Edward Lloyd*. The 11th clause provides, that, on the closing of any account figuring in the balance-sheet drawn on the 31st of *December*, 1859, and accepted as correct by all parties interested, a detailed statement of each account will be presented to *Edward Lloyd*, *William Lloyd*, and to the succession of the late *Julius Gaetjens*. This informs us of two things—first, that the balance-sheet left some matters not finally adjusted,

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which were to be closed and wound up ; and secondly, that, subject to such matters, the balance-sheet was accepted by all parties as correct, and must therefore form the basis of a settled account. I do not know that it affects the question of jurisdiction ; but it is to be observed, that the agreement of 1860 gives a right of account as between the persons who might represent *Julius Gaetjens* in *Hayti* and the surviving partners who make themselves agents for the purpose of the liquidation. In this state of circumstances two classes of accounts appear to be required—first, accounts of the *Haytian* firm during the life of *Julius Gaetjens*, and also of the same firm in liquidation ; and secondly—accounts of the *Liverpool* agency with the original *Haytian* firm, and also with that firm in liquidation.

It is contended, that, under these circumstances, the exclusive jurisdiction is in the courts of *Hayti*. I agree that the contract must be governed by the law of *Hayti*, the case of *The Carron Iron Company v. M'Laren* having settled that the law to regulate the transactions of a partnership is to be supplied by the place where the business is carried on. In this view, certain proceedings of a peculiar character, which were commenced in *Hayti*, may be found very useful and important in the prosecution of this suit. It appears, that after the death of *Edward* (which occurred very soon after the execution of the agreement of 1860), *William Lloyd* having thereby become liable himself to account to himself in another character, instituted proceedings calling upon the representatives of *Gaetjens* either to admit or deny the validity of certain accounts ; and certain interlocutory judgments were pronounced. The conclusive answer to the argument founded upon these proceedings against the jurisdiction of this Court is, that it is not alleged that *Agnes Lloyd*, the legal personal representative of *Edward Lloyd*, would be bound by anything which might

be done in that Court. I cannot assume that a foreign Court would attempt to bind persons not cited before it; and, indeed, the Common Law Courts of this country have refused to give effect to a final judgment of a foreign court, where it has appeared that parties interested were not summoned before it. It cannot, therefore, be suggested that *Agnes Lloyd* would be bound by the proceedings in *Hayti*. But even if she were bound, and were found to be a debtor, how could the other parties in *Hayti* compel her to pay? All *Edward's* assets are in *England*; and, therefore, it is impossible that any effect could be given to a decree in *Hayti* for payment out of these assets, except by taking proceedings here upon the judgment of the *Haytian* court.

Under these circumstances, I think it clear that such accounts as I have already specified ought to be decreed.

A further objection was taken, that a creditor of a firm cannot sue a debtor to the firm when there are surviving partners, without an averment of collusion; but it is impossible to yield to an objection of this technical character in a case where the same person is both the debtor and the surviving partner. In a case where the proper person to call for an account is himself the accounting party, no averment of collusion is necessary to give the Court jurisdiction to direct an account.

INQUIRE whether the *Haytian* partnership has been fully wound up under the agreement of the 4th of April, 1860; and if not, order it to be wound up. In the winding up regard to be had to the law of *Hayti*, as regulating the agreement of partnership and the agreement of 1860.

Direct accounts,—

1. Of the *Haytian* partnership up to the death of *Gaetjens*;
2. Of the same firm in liquidation since the death of *Gaetjens*;
3. Of the agency transactions between the *Haytian* and *Liverpool* firms;
4. Of the agency transactions pending the liquidation.

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In taking these accounts, regard to be had to the articles of partnership and the agreement of April, 1860. No settled accounts to be disturbed; but no allowance by *William Lloyd*, on behalf of the *Haytian* firm, of the accounts of the *Liverpool* firm after *William Lloyd* became a partner in the *Liverpool* firm, is to be treated as a settled account.

Liberty to all parties to apply to the Judge in Chambers to adopt any accounts or other proceedings which may be or have been taken before the *Chamber of Commerce* in *Hayti*.

Adjourn further consideration.

16 L. R. 57.

November 7th.

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MASSEY v. MASSEY.

Administration—Practice—Wilful Default.

In order to obtain an inquiry, with a view to a decree for wilful default at a future stage of the suit, the Plaintiff must rest upon one or more specific charges.

The observations in *Coope v. Carter* (2 D. M. G. 298) were not meant to let in general allegations of default, but to meet the case of specific allegations imperfectly proved at the hearing.

Therefore, where a widow and executrix, who was empowered by will to carry on testator's trade, did so for a short time, and her co-executors, in answer to an allegation that the book debts had not been got in, stated that the widow had got in some, that they believed the rest were bad, but that they had taken no steps themselves to recover any:—*Held*, that a sufficient case was not made to justify any inquiry as to wilful default.

THIS was a suit for the administration of the estate of *George Massey*, the testator, who died on September 10th, 1850.

The testator, for some time before his death, had carried on business as an innkeeper, omnibus proprietor, and postmaster; and by his will, dated January 17th, 1849, after directing payment of his debts, funeral, and testamentary expenses by his executors after named, out of his general personal estate, devised and bequeathed all his real and personal estate to the Defendants *Lambert* and *Milns*, and to *Henry Thornton*, upon trust to pay the rents of the real estate to his widow (the Defendant *Margaret Massey*), for life, with remainders over among his children, and to get in and convert the personal estate, and satisfy all such debts as should be owing by him at his decease, and invest the surplus and pay the dividends into the

proper hands of testator's said wife *Margaret*, for the maintenance of herself, and maintenance and support and education of all his children during her life; and after her decease, then upon certain trusts for the benefit of the children. And the testator thereby declared, that, notwithstanding the trusts thereinbefore declared and expressed were for the sale of his said personal estate and effects forthwith after his decease, yet it was his will and mind that in case his said wife should be desirous of continuing the trade or business of an innkeeper and omnibus proprietress and postmistress in the dwelling-house occupied by him, and in the manner in which he then carried on the same respectively, it should be lawful for his said wife so to do. And for the purpose of enabling her to carry on, manage, and conduct the said trade and business, he directed that she should, during the period of her carrying on the same, have the entire use, disposal, and management of his household goods and furniture, plate, linen, china, books, pictures, wines, spirits, and spirituous liquors, horses, carriages, omnibuses, and other vehicles, stock in trade and effects whatsoever, which should be in and about his dwelling-house, or which should be due or belonging to him in his said trade or business at the time of his decease, without being answerable or accountable for any loss or diminution in the value thereof, except as thereafter mentioned; but in case his said wife should refuse to carry on his said business in the dwelling-house then occupied by him, then he directed that she his said wife should have the use and enjoyment of such part of his said household effects as she (with the consent and approbation of his said trustees or trustee for the time being) might select, for and during the term of her natural life, for the purpose of furnishing a comfortable dwelling-house for the residence of herself and of his children, until the youngest of such children for the time being should attain the age

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of twenty-one years. And he directed his executors, as soon as conveniently might be after his decease, to take a full and correct inventory and valuation of all and singular his said household goods, furniture, and effects, or of so much and such part thereof as she might select as aforesaid, as the case might be; and that she should sign the same, to the intent that no diminution might be made in the value thereof, accidents and reasonable wear and natural causes only excepted, yet, nevertheless, with full power for his said wife to sell, dispose of, alter, vary, and change the same as she might think proper, so that the value thereof was not reduced, except as aforesaid, and in the natural course of business; and from and immediately after his said wife should have so made her selection as aforesaid, in the event of her declining to carry on and conduct his said business, then he directed that the goodwill of his said trade, and the capital, credit, stock, and effects which should be then in, due, or belonging to his said trade, together with all such part of his said household goods and furniture, plate, linen, china, and other effects, as should remain after such selection as aforesaid, should be forthwith sold, disposed of, and converted into money by his said trustees or trustee; and the moneys which should arise by such sale, disposition, and conversion, as the case might be, should be held by them or him upon the like trusts as were thereinbefore expressed and declared of and concerning his residuary personal estate, and the stocks, funds, and securities in which the same should or might be invested, and the interest, dividends, and annual produce thereof, or as near thereto as circumstances would permit; and from and immediately after the decease of his said wife, then he directed that the goodwill of his said trade, and the capital, credit, stock, and effects which should be then in, due, or belonging to the same, in the event of her carrying on

the same under the powers thereinbefore contained, together with all such household goods and furniture, plate, linen, china, books, pictures, and household effects as she should have selected for her use as aforesaid, should be sold and converted into money, under the powers and upon the trusts aforesaid. And the testator appointed his widow, and the said *Lambert, Milns, and Thornton*, executrix and executors of his will.

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The will was proved on October 25th, 1850, by the widow, *Lambert*, and *Milns*.

The bill alleged that the Defendants *Lambert* and *Milns* alone acted in the administration; that they realised portions of the estate at a loss, and neglected to get in other portions thereof which might and ought to have been got in; that five or six years after the testator's death they advanced out of the residue a sum of £850 to the widow, on the security of a policy on her life; that the book-debts of the trade, at the testator's death, were good, and might have been all recovered, and that none of them were got in by *Lambert* and *Milns*; that they wholly neglected to get in the same; and that by reason thereof the same had been wholly lost to the estate.

The bill prayed administration, and that the Defendants might be charged with wilful default, and might make good the advance of £850; and for other relief.

The Defendants *Lambert* and *Milns*, by their original answer, stated that the furniture and stock in trade were sold by the widow and themselves on November 14th, 1850, for £1,715 18s. 6d., and the goodwill for £49 18s. 6d., and made the following statement as to the book debts:—

“We have been informed by the Defendant *Margaret Massey*, and believe it to be true, but we cannot further or

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otherwise set forth the same, that there were book debts due to the testator at the time of his death ; but we cannot set forth, as to belief or otherwise, whether the same did or did not amount to £300, or to any other and what sum. The said book debts were due in respect of the testator's trade or business of an inn-keeper, omnibus proprietor, and post-master, which was by the will authorised to be carried on by his widow, the said *Margaret Massey*, and which business was in fact carried on by her for a short time after the testator's death. The said book debts were not, nor was any of them, received or got in by us or either of us, but we have been informed by the said *Margaret Massey*, and we believe it to be true, however we cannot further or otherwise set forth the same, that such debts, or some of them, were received or got in by her the said *Margaret Massey*, but we have no information respecting the particulars of such aforesaid debts or any of them ; and save as herein appears, we cannot set forth as to our information, belief, or otherwise, whether the same debts or any or which of them, or to what amount, have or not been received or got in, or when or by whom."

By their answer to the amended bill the same Defendants denied that they had realised any portion of the estate at a loss, or that they had neglected to get in any part thereof ; and, after repeating the former statement as to book debts, stated that they could not further set forth whether any of the book debts were good, or might not have been recovered by reasonable or ordinary diligence or otherwise, and submitted that under the provisions of the will (so far as respected the rights of the persons beneficially interested), the right of getting in such debts, and the duty of exercising any care or diligence in respect thereof, attached to *Margaret Massey* alone ; " and, speaking according to the best of our information and belief, we say that she did get in such

debts, or some of them ; and that such, if any, of them as were not in fact gotten in, were due from parties who were not able to pay them ;" and they admitted that they had taken no steps to recover or get in the same.

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Mr. Willcock, Q.C., and Mr. Everitt, for the Plaintiffs :—

Argument.

The will gives no power to the executors to make advances to the widow. They must, therefore, be charged with the amount of these advances.

Then, as to wilful default : there is a sufficient case on the pleadings, if not to charge the executors immediately with wilful default, at any rate to entitle us to an inquiry, as the basis of a future charge.

We allege that debts which might have been recovered were never got in. Their answer is, that the widow got in some, and that they believe (they don't say why) that the rest were bad. At the same time they admit, that they know nothing about these debts, and never attempted to recover them. Even supposing that their responsibility was relieved during the few weeks that the trade was carried on by the widow, they do not allege that there were no debts then outstanding, or that they made any inquiry to ascertain whether they were recoverable or not. One executor cannot shelter himself behind another for such neglect of duty : *Styles v. Guy*(a).

Then, for the purpose of an inquiry, a case of suspicion is enough : *Coope v. Carter*(b), where it was said(c) that notwithstanding Lord *Eldon's* rule, that, to obtain a decree as to wilful default, one act at least must be proved, still, in a case of suspicion, where it is likely that further evi-

(a) 1 M'N. & G. 422. (b) 2 D. M. G. 292. (c) Page 298.

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dence may be obtained, the Court ought to direct an inquiry short of directing wilful default, in order to ground a new order as to wilful default at a future stage.

Mr. *Burt*, for the widow.

Mr. *Rolt*, Q.C., and Mr. *Little*, for the acting executors :—

There can be no inquiry as to wilful default. The widow was entitled to carry on the trade and get in the debts. She did so as to some ; and as to the rest the executors believe that they were not recoverable ; and, at any rate, the responsibility was not on them. *Sleight v. Lawson* (a) is precisely in point, and that case was decided after *Coope v. Carter*.

Mr. *Willcock*, in reply.—The case of *Sleight v. Lawson* was quite different. There the charge was, that the executors had not realised the estimated value of the outstanding assets. Here the existence of the book debts is admitted as a fact. Moreover, the right and the duty to get in the debts was in the executors. The business was only held by the widow until the 1st of November, a month after the testator's death ; and it cannot be assumed that in this time all the recoverable debts were got in. The executors knew there were these debts, and took no steps ; and that is enough to support an immediate decree for wilful default.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Upon the question as to wilful default, I am disposed to abide by my decision in *Sleight v. Lawson*, which, in principle, applies to this case. I considered there that the obser-

(a) 3 K. & J. 292.

uations of the Lord Justice *Knight Bruce* in *Coope v. Carter* only went to this point: that, upon a distinct case of wilful default being alleged, and supported by doubtful evidence, there might, as upon any other subject, be an inquiry; but I thought that the old rule laid down by Lord *Eldon* was not intended to be departed from, where the bill contained a mere general allegation, not sufficiently specific to sustain a prayer for wilful default.

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In almost all cases a testator dies possessed of outstanding debts: but to allege generally that there are debts, and to ask whether the executors have got them all in, is not a sufficient foundation for a decree for wilful default. Here the charge relates to a limited class of debts—the book debts of the business—and my first impression was, that the admission by the executors that they had not got them in themselves would supply a sufficient ground for an inquiry. But they say further, that the widow did recover some of them; and, on being pressed by the interrogatories to the amended bill, they add their belief that those which the widow did not get in were bad debts, and could not have been recovered.

If, upon these admissions, I were to allow an inquiry, I must do the same in every case where a general allegation, that there are outstanding assets, without specifying particulars, is not met by a distinct denial. I do not think it makes much difference that the allegation in this bill is confined to book debts; and it would be a dangerous departure from the established rule, leading probably to, expenses greater than any benefit which might result, to direct an inquiry upon such grounds. In a case of this kind, a Plaintiff who seeks a decree for wilful default, ought to press the matter further, and bring the Defendants to a distinct issue, by fixing upon some specific debt or debts as the basis for the charge of wilful default. Under

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these circumstances, I do not think I ought to direct an inquiry, in the large and sweeping form which the inquiry must take if it is directed at all, namely, whether there were any book debts, and whether they were all got in, and, if not, under what circumstances.

The bill must therefore be dismissed, so far as it seeks to charge the Defendants with wilful default.

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Practice—
 Pleading—
 Creditor's Suit
 —Real Estate.

A creditor cannot have a decree for the administration of real estate, unless he sues on behalf of all creditors.

PONSFORD v. HARTLEY.

THIS case came on upon demurrer. The bill was supplemental to an original suit of *Ponsford v. Hartley*, and stated the following facts:—

In *November*, 1859, the Plaintiff filed his bill, originally against *John Hartley* (since deceased), and by amendment against *George Hartley* the present Defendant, and another, alleging that the Plaintiff and *John Hartley* had been partners in certain flour mills; that the partnership was dissolved by consent in *January*, 1856; and that a large balance was due from the said *John Hartley* to the Plaintiff under the covenants of the partnership articles and the terms of dissolution; and further alleging (by amendment) the death of the said *John Hartley*, and the proof of his will by *George Hartley* and the other Defendant thereto; and praying accounts of the partnership transactions, and that the executors might admit assets to answer what should be found due, or that the estate of the said *John Hartley* might be administered; and for a receiver of the partnership assets.

The present bill then proceeded to state, that by the death of his co-executor the Defendant *George Hartley* had become sole legal personal representative of the said *John*

Hartley, and had by his answer declined to admit assets; that the said *George Hartley* was also the sole devisee and legatee in trust of the real and leasehold estates of the testator; that the Defendant *George Hartley* had got in the testator's personal estate and taken possession of the real and leasehold estates, and had realised from the conversion of part thereof the aggregate amount of £22,000 and upwards; that the Defendant *George Hartley* alleged that he had paid away the whole of the said sum in satisfying some of the testator's debts; that the Defendant *George Hartley* threatened, and intended, as soon as he was able to collect and get in any further sums of money, either from the real or from the personal estate of the testator, "to pay the same to creditors, or alleged creditors, on the estate of the said *John Hartley*, with the express and avowed object and intention of thereby entirely defeating the rights of the Plaintiff, and of preventing him, the Plaintiff, from receiving out of the assets of the said *John Hartley* any sum which on the taking of the accounts prayed by the original bill might be found due to the Plaintiff from the estate of the said *John Hartley*."

The bill contained a charge "that the said *John Hartley* was not at his death indebted in any large amount to any but simple contract creditors; and that if the Defendant (as he alleged) had paid away the whole of the said sum of £22,000 and upwards to creditors of the testator, all such creditors were simple contract creditors only;" and also a charge that the testator's assets, real and personal, were more than sufficient, in a due course of administration, to have satisfied all the testator's debts and the claims of the Plaintiff in the original suit.

The bill prayed that this suit might be taken to be supplemental to the original suit; that the Defendant *George Hartley* might admit assets, real or personal, to answer what

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should be found due in the original suit; or that the estate, as well real as personal, of the said *John Hartley* might be administered.

There was also a prayer for an injunction to restrain the Defendant from collecting the outstanding personal estate, and from selling or mortgaging the real or leasehold estates, or receiving the rents thereof or interfering therewith; and for a receiver of the outstanding personal estate, and of the rents and profits of the real or leasehold estates, and to let and manage the same; and a prayer for further relief.

The Defendant demurred for want of equity.

Argument.

Mr. *Daniel*, Q.C., and Mr. *Archibald Smith*, for the demurrer:—

As an administration suit this bill is improperly framed. There is a distinction between suits by a single creditor (which this is), and those where the Plaintiff sues on behalf of all creditors. It is only in the latter class of suits that there can be any general decree for accounts, or any decree at all against real estate: *Bedford v. Leigh* (a), *Attorney-General v. Cornthwaite* (b), *Busby v. Seymour* (c), *Thorne v. Kerr* (d).

Neither can there be an injunction or receiver in a suit by a single creditor; and, so far as the personalty is concerned, the original bill prays administration as to that; and relief may be had in that suit so far as it can be had at all.

Consequently no relief can be granted in this suit, and the bill is demurrable.

(a) 2 Dick. 707.

(b) 2 Cox, 44.

(c) 1 Jo. & Lat. 527.

(d) 2 K. & J. 54.

The VICE-CHANCELLOR mentioned *May v. Selby*(a), and asked whether the bill might not be sustained as a suit to prevent the improper sale of realty, to which the Plaintiff looked for payment.

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Mr. *Daniel*.—There is no authority for a bill of that kind. If such a bill were good, the Plaintiff would move for a receiver and stop payment of every other debt, which he cannot do before decree. All creditors must be represented before a receiver and injunction can be granted. The Plaintiff here admits that the assets are sufficient, and does not make any intelligible charge of probable misapplication.

Mr. *Rolt*, Q.C., and Mr. *Bristowe*, for the Plaintiff:—

The principle of this bill is clear. We are litigating against a dead man, and we ask to have two undoubted rights established: first, to constitute our debt against the real as well as the personal representatives; and, secondly, to administer the estate.

It is said, you cannot have the real estate administered, except in a suit on behalf of all creditors: and I admit, that, as a matter of administration, the authorities go to that point; but it does not follow that a single creditor cannot have his debt established against the realty (which is certainly liable to it), although he may not be able in this suit to have the real estate applied. To support the demurrer, it must appear that we are not entitled to any relief; and we submit, that, at any rate, we are entitled to constitute our debt against the real estate. Possibly it may be necessary hereafter to amend, by making the bill on behalf of all creditors, in order to get full relief in the way

(a) 1 Y. & C. 235.

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of administration; but this does not make the bill demurrable.

Then, as to the receiver: the prayer of the old bill did not admit of a motion for a receiver of the real estate: *Pare v. Clegg*(a); and if we cannot in this suit have an unqualified order for a receiver, we may have a receiver appointed on motion to the extent of our claim without prejudice to the other creditors. Moreover, the Defendant, as executor, represents the other creditors, and there is abundant authority for the appointment of a receiver to secure assets in danger: *Anonymous*(b), *Middleton v. Dodswell*(c). The Defendant is purposely paying away the assets to defeat the Plaintiff, and there must be some means of preventing this wrong.

Our difficulty was, that the original bill was not on behalf of all, and, therefore, it would have been a departure to frame the supplemental bill in that shape, and it was too late to amend.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This demurrer must be allowed. The bill is of an entirely novel character, though an amendment of a few words would probably remove the whole difficulty. The bill is not framed on behalf of all creditors, and this not, as it appears, from any slip, but advisedly. The original suit was against the testator, his executors having been subsequently made parties upon the death of the original Defendant pending the suit. This accounts for the first bill being by the Plaintiff alone. By the amended bill a declaration was asked against the estate of the testator, and

(a) 9 W. R. 216. (b) 12 Ves. 4. (c) 13 Ves. 266.

that the executors might admit assets, or that the estate might be administered; but no relief was asked against the real estate of the testator.

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Then, this supplemental bill is filed, seeking to have the Plaintiff's claim established against the realty as well as the personalty, and praying for the administration both of the real and personal estate.

The bill avers that the Defendant, in order to defeat the Plaintiff's claim, is about to pay the assets which he may get in to creditors or alleged creditors of the testator (and, as against the pleader, I must understand this to mean actual creditors). There is, besides, an allegation that the assets are sufficient to satisfy all the debts, including the Plaintiff's claim; and, that being so, I do not see how the conclusion can be arrived at, that the payment of other creditors will defeat the Plaintiff. The bill proceeds to pray administration of the real and personal estate, and then the pleader has fallen into a difficulty occasioned by the authorities, which have decided that a single creditor, not suing on behalf of all, cannot have a decree for the administration of real estate.

It occurred to me that relief might possibly be given under the prayer for a receiver, in order to prevent the property being disposed of; but there are many difficulties in the way of such a course. One is, that the rights of other creditors would not be provided for, though, perhaps, means might be found of obviating that by some special provision in the order. If there had been any sufficient averment that the Defendant was about to waste the assets, some method would be found of preserving the property in medio. But it is not necessary to consider whether this would be practicable in a case of emergency, because no such case is alleged. Reading the averments in the

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—
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most favourable way for the Plaintiff, they scarcely come up to this—that the Defendant is about to pay simple contract creditors, leaving the Plaintiff's specialty claim unsatisfied; and that would be no injury, inasmuch as the assets are said to be sufficient to pay all the debts. There is nothing like an averment of an intended appropriation of the assets to the Defendant's own use.

There is, therefore, no special case made for a receiver on the ground that the property is in danger of being lost; and the suit is reduced simply to a bill for the administration of real estate, not for all the creditors, but for one alone. So far, therefore, as relief is sought in respect of the realty, the bill cannot be supported.

It is said, indeed, that, at all events, a Plaintiff is entitled to bring the executor and devisee before the Court, in order to establish the debt against both the real and personal estate; but that would be a very novel form of pleading: and it is to be observed that the bill is not framed with that special view, but prays administration of the real estate.

Then, it is said, that, under the circumstances, the bill ought to be sustained, although relief is prayed on behalf of one creditor only; because the original bill, being by the Plaintiff alone, it was not open to him to make the supplemental bill on behalf of all, and it was too late to amend the original bill.

There is nothing to show that it was too late to amend; but even if it were necessary to proceed by a bill in the nature of a supplemental bill, it might have been supplemental so far as necessary, and otherwise an original bill on behalf of all.

I have no doubt, that, on a proper case being made

of danger to the estate, means would be found for appointing a receiver; but I cannot say that I am favourably impressed with the view that a specialty creditor, Plaintiff in a suit for administration, is at liberty, instead of pressing on his suit to a decree, to come here with a supplemental bill to restrain the executor from paying any simple contract creditors until such time as he may obtain a decree. That is, again, quite a novel contention; and I can find nothing in the bill by which it can be sustained in its present shape.

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DEMURREE allowed, with costs. Liberty to amend.

Minute.

14 Ch D 55
14 — 426

SCRIVEN v. SANDOM.

BY his marriage settlement *Williams Sandom* covenanted, that, in case his wife should survive him, his heirs, executors, or administrators would, within twelve months after his decease, pay to the trustees the sum of £2,000, to be held on trust for the wife for life, and after her decease upon such trusts and for such purposes as the said *Williams Sandom* should by deed or will appoint, and in default for his next of kin.

Williams Sandom made his will, dated August 2nd, 1856, and thereby recited the covenant, and directed his executors to raise the said sum of £2,000, and pay the same to the trustees of the settlement, in order that they might invest the same, and pay the income thereof to his

they might invest it, and pay the income to the wife for life; and then bequeathed his residuary estate, subject to certain legacies, to the wife absolutely:—*Held*, that the residuary bequest was a good execution of the power.

Semble, nothing short of inconsistency can amount to the contrary intent required by the statute.

June 7th.
Will—Residuary Devise
—Power—
Contrary Intent—Statute of Wills—1 Vict. c. 26.

A testator was under covenant to pay £2,000 to the trustees of his settlement, upon trust for his wife for life, with remainder to his general appointees by deed or will.

By his will, he directed the executors to pay the £2,000 to the trustees, in order that

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wife for life; and, after other bequests and devises, the testator gave and bequeathed all the residue and remainder of his estate and effects, subject to certain legacies, to his wife. The testator died in 1858, and his wife in 1860.

The executors of the wife and the next of kin of *Williams Sandom* respectively claimed the £2,000.

The bill was filed by the trustees of the settlement to obtain the direction of the Court upon the point.

Argument.
 —

Mr. *Lonsdale*, for the Plaintiffs.

Mr. *Willcock*, Q.C., Sir *H. Cairns*, Q.C., and Mr. *Borton*, for the next of kin, argued that the residuary bequest was not an execution of the power, a contrary intention appearing on the will by the gift of the income, in the first instance, to the wife.

[They cited *Hutchins v. Osborne* (a)].

Mr. *Martindale*, for the widow's executors.

Judgment.
 —

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This case presents some difficulty; but I do not think I can say that there is anything in the will inconsistent with the intention to exercise the power. There is no contrary intention within the meaning of the statute, unless you find something in the will inconsistent with the view that the general devise was meant as an execution of the power.

It would not be a safe rule to proceed upon, to pick out little circumstances, and infer from them whether the testator had or had not in his mind the intention of exercising the power; there ought to be shown something which can fairly be described as inconsistent with such an intention. The cases upon dower have some bearing on the point, where it is always held that dower attaches in the absence of some positive inconsistency between the gifts contained in the will and the claim of dower. Other analogies of the same kind may be suggested; and they all tend to the conclusion, that the only safe rule for discriminating between mere conjecture and the contrary intent required by the statute, is to inquire whether there is anything in the will inconsistent with the notion that the residuary bequest is meant to operate as an execution of the power.

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I agree, that if you find a gift of a particular interest, that may be inconsistent with an appointment of the whole to the same person. The gift of part of an estate, or of a rent charge out of it, may fairly be considered as inconsistent with the gift of the whole; but this is not what I find upon the will before me. All that the testator does is this: He directs his executors to pay the £2,000 to the trustees of his marriage settlement, to be invested for the wife for life. This payment to the trustees, pursuant to the covenant, is quite consistent with the wish that his wife should have an interest in remainder, if the estate would admit of it. If there were a doubt as to the sufficiency of the assets, the wife could in any case have come in as a creditor in respect of her life interest, and (regarding the will as an execution of the power,) she would have such further interest as might not be exhausted by the testator's debts. Taking this to be the testator's wish, there is no inconsistency between a direction to pay

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the income to the wife for life, and the further intention to give her an interest in the capital of the fund.

It is to be observed, that the testator gives the residue subject to legacies. He may have foreseen that his wife must, in any event, take the whole life interest, and, therefore, he gives her that absolutely, and the remainder subject to the legacies.

The case does not come within the principle that a partial gift out of a fund may be read as excluding the intention to appoint the whole by a general bequest. I therefore hold the will to be a good execution of the power.

2087 492
 786 370

Nov. 7th & 8th;
 Dec. 5th.

BEDFORD AND CAMBRIDGE RAILWAY COMPANY v. STANLEY.

Railway Com-
 pany—Con-
 tract by Pro-
 moters—Speci-
 fic Performance
 —Notice to
 treat—Entry—
 Waiver—
 Lands Clauses
 Act, s. 85.

IN the year 1858 *W. H. Whitbread* and *W. Ekin* were the acting promoters of a projected railway, to be called the *Bedford, Potton, and Cambridge Railway Company*, for making a railway from *Bedford* to *Cambridge*.

Before the formation of a

Company, the Defendant and other landowners, being desirous of obtaining certain railway communication, signed an agreement with a person acting for the promoters, but described as the agent of the Company, that, if an Act were obtained in either of the two next sessions, they would sell such land as might be required for the railway at thirty years purchase.

The bill was lost in the first session, and, after an alteration in the course of the line, was passed in the second session:—*Held*, that the agreement was binding on the landowners, and that it might be specifically performed at the suit of the Company, notwithstanding objections for want of privity, want of consideration, want of mutuality, and vagueness.

After the passing of the Act, the Company—before claiming the benefit of the agreement—served the Defendant with a common notice to treat, and did not formally insist on the agreement until the Defendant had appointed an arbitrator.

The Company subsequently entered under the 85th clause of the Lands Clauses Act:—*Held*, that this clause applied exclusively to compulsory purchases; that the proceedings of the Company assumed the non-existence of any agreement: and on these grounds a bill by the Company and two promoters for specific performance of the agreement was dismissed.

perty the line was intended to pass, and an agreement was executed by a large number of landowners, and, among others, by the Defendant *Stanley*, in the following form :—

“ We, the undersigned, being desirous to obtain railway communication between *Bedford* and *Cambridge*, hereby agree with *Henry Trethewy*, as agent for the *Bedford and Cambridge Railway Company*, that, in the event of an Act being passed in the sessions of 1859 or of 1860, to enable the making of a railway from *Bedford* to *Cambridge*, we will sell, each one respectively, such land as may be required from us for its construction at the rate of thirty years purchase upon the annual rental, including all compensation of every kind, excepting tenants' compensation. We further agree to adjust the accommodation works necessary for our estates on the most moderate scale, in order in every way possible to assist the promoters of the undertaking in carrying it into effect.”

The said agreement was signed by the Defendant *Stanley* on the 23rd of October, 1838.

Having obtained this agreement, the said promoters introduced a bill in the session of 1859, the Defendant's name being, with his consent, used as one of the promoters. The bill was opposed by the *Eastern Counties Railway Company*, and rejected.

In the session of 1860 a new bill was introduced, by which the course of the proposed line from *Bedford* to *Cambridge* was altered; but the new line passed through the Defendant's lands, though not at the same part thereof as the original line.

The Defendant signed the subscription contract for the new line, the Act for which was obtained on the 6th of August, 1860, the name of the Company now being *The*

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Bedford and Cambridge Railway Company. The Lands Clauses, Companies Clauses, and Railways Clauses Consolidation Acts, 1845, were incorporated with the special Act.

The Defendant was a provisional director, and, since the passing of the Act, had been a director of the Company.

The Defendant alleged, that, on signing the subscription contract, he stated that he did so only on the understanding that the agreement was not to be considered applicable to the altered line; but it did not appear that this statement was ever communicated to the other directors, or to any person authorised to act on behalf of the Company in respect of the waiver of the agreement.

On the 2nd of May, 1861, the Plaintiffs, *The Bedford and Cambridge Railway Company*, served the Defendant with a notice to treat in the common form, containing the clause, that if the Defendant and the Company should not, within twenty-one days, agree as to the amount of compensation, the Company would proceed to require the amount of such compensation to be settled in the manner provided for settling cases of disputed compensation by the Lands Clauses Consolidation Act, 1845. The notice was dated the 30th of April, 1861, and was addressed to the Defendant, and to all persons having or claiming any interest in the lands which were delineated on a plan annexed.

After the receipt of this notice the Defendant's solicitors, on the 4th of June, sent to the Plaintiffs' solicitors the following letter:—

“4th June, 1861.

“Dear Sirs,—This matter has been placed in our

hands; and as it does not appear very probable that we shall agree on the amount of compensation to which Mr. *Stanley* is entitled, and considering that gentleman's position as a director of the Company, we shall advise him not to make a formal appointment of arbitrator, but to leave the question to some impartial person, who would act as sole arbitrator between Mr. *Stanley* and the Company. If you agree on this course of proceeding, and will send us the names of two or three gentlemen, we will select one, and the reference can then proceed without delay."

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On the 5th of June the Plaintiffs' solicitors served the Defendant's solicitors with a notice, dated the 4th of June, by which, after reciting the landholders' agreement, and the notice of the 30th of April, the Company gave notice, "that, having adopted the said agreement so entered into by you with the said *Henry Trethewy* as their agent, they have always been, and now are, ready and willing, and hereby offer, to purchase the said lands mentioned and described in the said notice of the 30th day of April, 1861, and all such other lands (if any) as they may require for the purposes of their said undertaking, at the rate of thirty years purchase upon the annual rental, including all compensation of every kind excepting tenants' compensation, and in all respects to perform the said agreement on their part; and they hereby require you specifically to perform the said agreement on your part; and they hereby demand from you an abstract of your title to the said land mentioned and described in the said notice."

This notice was accompanied by a letter, of the same date, to the Defendant's solicitors, as follows:—

"*Bedford and Cambridge Railway Company* and *Stanley*.

"Dear Sirs,—You are probably not aware of the agree-

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ment entered into by Mr. *Stanley* before the passing of the *Bedford and Cambridge Act*, which will have some effect upon the proceedings between Mr. *Stanley* and the Company for ascertaining the sum to be paid for his land. We were about to serve a notice upon him with reference to the agreement above referred to, and you will probably save us that trouble by accepting service of it on behalf of Mr. *Stanley*."

To this letter the Defendant's solicitors replied as follows on the 6th of June :—

" *Bedford and Cambridge Railway and Sidney Stanley.*

" Dear Sirs,—Referring to yours received yesterday, you are probably not aware that a distinct assurance was given to Mr. *Stanley*, as we are instructed, at the time he executed the subscription contract for the line of 1860, that the memorandum he had signed in reference to the line of 1859 would not be considered applicable to the altered line of 1860, which he stated at the time would be most objectionable to him, and would prove far more damaging to his estate."

On the 20th of June, 1861, the Plaintiffs' solicitors replied, stating that the directors intended to enforce the performance of the agreement of 1858, and denying that the alleged assurance had been given.

On the 10th of July the Defendant appointed an arbitrator under the notice of the 30th of April, and, on the 12th of July, gave notice to the Company of such appointment.

The original bill was filed on the 20th of July, 1861, by

the Company, *Whitbread*, and *Ekin*, as Plaintiffs, against *Stanley*, praying a declaration that the Company were entitled to the benefit of the agreement; a decree for specific performance; an injunction to restrain the Defendant from taking proceedings under the Lands Clauses Act for determining the amount of compensation to be paid by the Company except on the footing of the agreement; or, in the alternative, that the Defendant might be decreed to pay damages for the breach of the agreement.

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After the filing of the bill, the Company served on the Defendant a notice, dated the 22nd of July, reciting the agreement, the notice dated the 30th of April, the notice dated the 4th of June, and the Defendant's notice of the appointment of an arbitrator; and giving notice (subject and without prejudice to the right of the Company to compel specific performance of the agreement, and protesting against the Defendant's right to have his claim for compensation settled by arbitration) of the appointment of an arbitrator on behalf of the Company.

On the 9th of August the Company gave a bond to the Defendant reciting the same documents, and that the Plaintiffs were willing to pay for the said land at the rate of thirty years purchase, and reciting the payment into the Bank by the Company of the deposit, ascertained in the usual way by a surveyor, and conditioned to secure all compensation which might, in the manner provided by the said Acts, be determined to be payable, with interest thereon from the time of entering.

The Defendant's solicitors wrote, on the 16th of August, 1861, to the Plaintiffs' solicitors, to the effect that the service of the bond and the entry into possession under the statutory powers amounted to an assent that the

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agreement was not subsisting ; that the Defendant denied the correctness of the recitals in the bond, and protested against them ; that, if the Company entered on the Defendant's lands, he would seek to treat their bond—and all other proceedings on the part of the Company to obtain possession of the land under the powers of the Lands Clauses Act—as an admission on their part of the non-existence of any such agreement as alleged. .

In September, 1861, the Company entered upon the Defendant's land, comprised in the notice of the 30th of April, 1861.

The lands of the Defendant, required for the purposes of the line sanctioned by the Act, as well as those which would have been required for the original scheme, were exclusively agricultural land, of which the average rental was about £1 per acre.

The Defendant insisted, that the change in the course of the line annulled the agreement, if it were even valid, and that ever since the change of the line it had been so treated by him ; and alleged that his signature to the subscription contract for the new line was obtained on the understanding that the agreement did not apply to the new line ; and further, that the new line and the works thereon were more prejudicial to his land than the original plan.

There was some conflict of evidence as to whether the Defendant had seen the plans of the originally proposed line before signing the agreement ; but it appeared that he was, at any rate, aware of the general course of it.

Argument.
 ———

Mr. Rolt, Q.C., Sir H. Cairns, Q.C., and Mr. Speed,
 for the Plaintiffs :—

The law is quite settled, that an agreement entered into by the promoters of a railway company is binding, if subsequently acted upon or adopted by the Company after the Act is obtained: *Edwards v. The Grand Junction Railway Company*(a). This was done here, and the Defendant as a director was well aware of it; and it is material to observe, that, while the bill was passing through Parliament, he never hinted to his co-directors that he intended to repudiate the agreement.

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The form of the agreement is perfectly good, it being a contract with *Trethewy*, described as agent of the Company, and that contract having been adopted by the Company when it came into existence.

The doubts which have been thrown upon *Edwards v. The Grand Junction Railway Company* in some cases in the House of Lords, do not touch a case where the Company adopts the promoters' contract, either by a formal instrument or by conduct, assuming of course that the contract of the promoters is one which it would be *intra vires* the Company to enter into as an original contract, as to which there can be no question here: *Caledonian and Dumbartonshire Railway Company v. Helensburgh*(b), *The Eastern Counties Railway Company v. Hawkes*(c), *Preston v. Liverpool &c. Junction Railway Company*(d). It is clear that the agreement was not meant to be confined to the specific line originally projected, for the plans of that line were not finally settled and deposited till November, whereas the agreement was signed by *Stanley* in October.

Then it is suggested, that the notice to treat was an

(a) 1 My. & Cr. 650.

(c) 5 H. L. Cas. 331, 356.

(b) 2 M'Q. 391.

(d) 5 H. L. Cas. 605.

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abandonment of the agreement: but the intention of it was to have the compensation settled on the basis of the agreement.

With respect to the objection, that the agreement was not mutual at the time when it was executed, the answer is, that the Court constantly enforces one-sided undertakings and optional or conditional agreements, where they have been acted on, where the option has been exercised, or the condition performed: *Palmer v. Scott(a)*, *Chesterman v. Mann(b)*.

Mr. James, Q.C., and Mr. Bovill, for the Defendant:—

In the first place, there is no contract at all. The agreement purports to be, not with *Whitbread* and *Ekin*, but with *Trethewy*, as the agent for the *Bedford and Cambridge Railway Company*. Who, then, are the promisees? Not *Whitbread* and *Ekin*, for that is plain on the face of the agreement; not the Company, for no such Company was in existence; not *Trethewy*, for he describes himself as a mere agent: and the Plaintiffs show that they feel this difficulty, by joining *Whitbread* and *Ekin* with the Company as Plaintiffs. Moreover, even treating this as the promoter's contract, there was no consideration. Neither the Company nor any one is bound by it to make a railway, or to do anything. The authority of *Edwards v. Grand Junction Railway Company*, even if unshaken, would not cover this case. All that it decided was, that a Company cannot take the benefit of a promoters' contract without also taking the liability. It does not say that the Company is entitled to the benefit of all contracts made by the promoters. The House of Lords' cases, which have already been referred to, lay it down clearly that the promoters'

(a) 1 Russ. & My. 391.

(b) 9 Hare, 206.

contract itself is a mere nullity. The Company is bound, if its Act so provides, not by force of the contract, but by the terms of the Act. So, also, the Company may be bound after its incorporation by adopting the promoters' contract: that is, in effect, by making a new contract in the same terms, but this only where such a contract would be within the statutory powers. Now, here there is nothing in the Act upon the subject of this agreement; and not only no adoption of the contract until after the Defendant had withdrawn it, but, on the contrary, a clear waiver and abandonment of it by the service of the notice to treat. The notice itself is an inchoate contract: *R. v. Hungerford Market Company* (a); consequently there would, on the Plaintiffs' contention, be two subsisting and inconsistent contracts at the same time.

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The fact is, that the so-called agreement was never meant to be more than a general indication of the course to be taken. It is absurd to suppose that the Company were to have a roving right of taking any land they pleased at thirty years purchase, and the contract was never meant to apply to the altered line. If it did, new land might be taken, including, perhaps, the mansion-house itself: and it makes no difference as to the validity of the contract that this is not what has actually happened. It is enough that such a case might arise, and then or in the event of the site of roads being taken, it would be impossible to apply the rule of thirty years purchase; and the contract, even if binding in other respects, would be too vague to be enforced in this Court.

Lastly, this is a mere money question, and a proper case for a Court of law.

Mr. *Rolt*, in reply.—The objections taken to the agree-

(a) 1 Ad. & E. 668.

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ment, as I understand them, are these:—1. No consideration and no mutuality; 2. No privity with the Plaintiffs; 3. That it is not a case for specific performance, but for a court of law.

On the first point, it is quite clear, that, if an option of a bargain is given to A. if he think fit to accept it, and he does afterwards accept it, that constitutes a binding contract. It is true, that the agreement immediately after its execution gave the Defendant no power to compel the Company to buy at thirty years purchase; but it was an offer to sell at that price if the Company should get its Act. The Company does get its Act, and does declare its intention of buying on the terms of the offer; and that is sufficient to make the contract mutual and for good consideration.

As to the objection for want of privity, I will take the description of the contract which is set up on the part of the Defendant—it is a contract with the agent of a proposed company, and the objection on this ground is just the same technical difficulty which was got over by Lord Cottenham in *Edwards v. Grand Junction Railway Company*; and to this extent none of the subsequent dicta have invalidated that authority.

The principles are these: In the case of a contract onerous on the Company, the Company cannot dispute an agreement to which it owes its existence. All the qualification introduced by the House of Lords' cases which have been relied upon, amounts only to this—that the agreement must be one which it would be within the powers of the Company, when created, to enter into; and that condition is satisfied here. And, on the same principle, a Company may claim the benefit of a like contract, subject only to the like condition.

Then, as to the alleged waiver by the notice to treat : it is obvious, and it is in evidence, that the notice was not meant as a departure from the contract, but was thought necessary to supply the machinery for ascertaining the acreage of the particular lands, for obtaining title and possession, and for other matters ancillary to the agreement. There is no inconsistency between the notice and the agreement, except on a hypercritical reading, which ought not to be applied to documents like these common railway notices.

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As for the pretence that the change in the line absolved the Defendant from his obligation, this is a perfectly idle contention, considering the general terms of the contract ; the failure of the Defendant to prove that he even saw the original plans before executing the agreement ; and the absence of any distinct averment that he signed the agreement on the faith of the original line being adhered to, and that he so informed his co-directors.

The Company, on the other hand, have changed their position on the faith of the agreement. The Defendant has got the benefit of the railway which he was desirous to have made, and now refuses to pay the promised price.

Lastly, the contention, that this is a mere money question, and therefore not a subject for specific performance, would apply with equal force to every bill by a vendor for specific performance.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Dec. 5th.
Judgment.

The bill in this case is filed by a Railway Company for specific performance of an agreement, entered into before the Company was incorporated, by the Defendant *Stanley*,

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a landowner on the line, with an agent of the promoters of the Company. By this agreement the Defendant agreed to sell such of his land as should be required for the railway at the price of thirty years purchase.

The case was very ably argued, and Mr. *James* suggested every possible difficulty in the way of enforcing such a contract.

It was objected, that the agreement purported to be made with a person described as the agent of the Company, when, in fact, there was no Company in existence, and that, consequently, there was no one who could be regarded as the promisee; and this difficulty, it was said, was evidently felt by the Company, who joined two promoters as co-Plaintiffs, although the agent was not described in the contract as acting on their behalf.

The second objection was, that, even admitting that a person could contract as agent for a non-existing Company, still, according to the doctrine laid down by the House of Lords, this contract would not be binding on the Company when formed.

In the third place, it was contended, that the agreement was void for want of mutuality, and also for want of consideration.

Other objections were—the vagueness of the stipulations; and their inapplicability to a line sanctioned in a subsequent session, and not identical with that originally proposed; and it was insisted, that the true construction of the document was, that it was meant rather as a general guide for the assessment of compensation, than as a precise and certain contract.

I am of opinion, that all these objections were satisfactorily answered. With respect to the form of the agree-

ment, there is no question that the Company pointed at was *The Bedford, Potton, and Cambridge Company*, of which the Plaintiffs, *Whitbread* and *Ekin*, were two of the promoters, and that these gentlemen agreed to sign the subscribers' contract, and to take on themselves the Parliamentary expenses in case the application should prove unsuccessful: a sufficiently onerous responsibility. When, therefore, the agreement speaks of the agent of the *Bedford and Cambridge Railway Company*, I think it must be taken to mean the agent of the body of men who had associated themselves together for the purpose of obtaining an Act of Parliament for the incorporation of the projected Company.

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I do not think that this is a matter which comes within the scope of the observations that have been made in the House of Lords upon the case of *Edwards v. Grand Junction Railway Company*, where Lord Cottenham held a Company bound by the engagements of its promoters.

The distinction which was insisted on in the House of Lords is put in a very clear light in the case of *Hawkes v. The Eastern Counties Railway Company*, and has no application to a case like the present. If an agreement is entered into by promoters, which it would be competent for the directors of the Company to make upon the passing of their Act, and if the contract is a beneficial one for the Company, there can be no reason for saying that the agreement is not binding. The case may be justly compared to that of a person contracting (before Lord Cramworth's Act) to purchase an infant's land at a certain price, in case an Act of Parliament should be obtained to sanction the sale. It is beyond all question, that, upon the Act being passed, the purchaser could not possibly dispute the agreement.

The alleged want of consideration may also be disposed

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of in the same way. There was valuable consideration passing from the promoters to *Stanley*, when they undertook considerable risk in the hope of benefiting themselves and him by procuring the passing of the Railway Act. It was by their outlay, and at their risk, that the Act was obtained; and the Company, in accordance with the usual provision, became bound by their Act to recoup this expenditure.

It was suggested, that, as soon as the Act passed, the agreement was merged in its provisions, just as a preliminary agreement is merged in a completed deed; and that, except so far as the terms of the contract were incorporated in the Act, they must be considered as abandoned. But it is not necessary or usual to insert in Acts incorporating companies special agreements of this nature; and it appears to me, that the contract being such as would be *intra vires* and beneficial for the Company, it is no objection to it that it was not inserted as a special clause in the Act.

Then it was urged, that the contract was unilateral, and contained nothing which the Defendant could have enforced against the Company. There is a fallacy in this argument, which is answered at once by the form of the agreement itself. It is an agreement by which, on condition of the Railway Act being obtained, the Defendant granted the option of purchasing the land at a certain price. In one sense such a contract may be called unilateral, because, until the condition is performed, there is nothing which can be enforced; but the promoters paid the expenses of obtaining the Act (the price, in other words, of their option), and thereupon became entitled to the option which they had bought. It does not appear to me, therefore, that any of these objections can prevail.

It was further argued, that the agreement is too vague

to be specifically performed; and it did at first strike me that there might be some difficulty in ascertaining the amount of the rental, but the answer removes any difficulty of this kind. However, the point mainly insisted on in support of this argument of vagueness, related to the claim of the Company to hold the agreement applicable to the altered line which was sanctioned on the second application to Parliament. Now, it is obvious that the agreement itself does not point to any specific land; and as the agreement allowed two years for obtaining the Act, the Defendant must have been aware of the probability that on a second application it would be found desirable to vary the course of the line; and it may well be supposed to have been with this view that the agreement was so drawn as not to tie the Company down to any specific portion of the land, but was put into this shape: "In consideration of your obtaining authority to make a railway which I want, I agree to let you have any land you may require for the purpose at such and such a price." It is said, that the new line passes through the Defendant's land so as to cause more inconvenience than the original line would have done; but if any objection of this kind had been intended to be insisted on, the plain course for *Stanley* to take would have been, to give due notice that he did not consider himself bound by the agreement. A real case of hardship of this description might then have furnished a sound argument against specific performance, or even a good ground for opposing the second bill in Parliament. But the mere antecedent possibility of such a case arising on the terms of the agreement is not a reason for refusing performance, where in fact the hardship has not actually arisen. It appears that both the lands originally proposed to be taken and those which are now required consist exclusively of agricultural land; and certainly no case of hardship is made out, such as that suggested in argument, the taking of a mansion under an agreement intended to apply to a meadow. The Defendant indeed

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does say that he objected to be bound by the agreement when the alterations were made in the course of the line, and for that reason refused at first to put his name to the subscription contract. But taking this to be proved, the answer is, that these objections never reached the Company or the promoters. They are not alleged to have been made to any person who properly represented the Company for the purpose of receiving them. And it is material to observe, that the Defendant allowed all the parliamentary expenses to go on without letting the promoters of the Company know that he repudiated the agreement.

The only real difficulty in the Plaintiffs' case is this: the Company, if they considered the agreement binding, ought to have applied to the Court in the first instance to compel *Stanley* to perform it, instead of serving him with a notice requiring him to treat for the sale of the land under the compulsory powers of the Lands Clauses Act. On reference to the Act, it will be seen that the proceedings as to taking land by agreement are regulated by the first sixteen clauses, after which a further set of clauses commences, providing for the compulsory taking of land; and it is under these that a notice to treat, such as was served on the Defendant, is given. By this notice, therefore, the Company committed the mistake of asking *Stanley* what compensation he claimed for his land. The service of it brought all the compulsory powers into operation, and the Defendant is entitled to say that the present bill is an application by the Company to prevent the arbitration, which is the legitimate sequence of the proceedings which they have adopted. The Defendant had a right under this notice to appoint an arbitrator, and it was not until after he had proposed a reference that the Company gave notice that they held him bound by the agreement. Possibly the mistake might in some way have been cured, but there was more in it than mere accident. The Plaintiffs contend that the notice was

necessary to ascertain the value of the land under the terms of the agreement; but the only notice required for that purpose would be one specifying the number of acres to be taken under the agreement. I think, therefore, that the effect of the notice was to bind *Stanley* to sell under the compulsory process provided by the Lands Clauses Act, the Company at the same time having the benefits in respect of title, which the Act confers upon them. Thus, if *Stanley* proved to be only a tenant for life the Company would obtain a good title, which he could not otherwise give under the agreement made before the Act; and if his title failed, either the notice or a new agreement would be required.

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Still, I have felt so satisfied that the notice was not given with any such view as this, that I have been extremely anxious to get over the difficulty. But there is another step in the proceedings to be considered. The bond, it is true, contains a saving of the rights of the Company under the agreement; but then the Company have availed themselves of the powers of the Act, to take compulsory possession by virtue of the bond and the accompanying deposit; and the eighty-fifth clause of the Lands Clauses Act, under which these proceedings were taken, does not apply to sales by agreement. It is clearly confined to the second branch of the Act which relates to compulsory purchases. It is meant to meet the case where a landowner declines to enter into an agreement, and, in that event, to give the Company the right to take immediate possession, and has no application to a case where the Company desire to enter under an agreement.

The Plaintiffs should have filed their bill at once upon the agreement, in which case they would have lost the privilege of entering under the eighty-fifth section, and must have applied to the Court to do what was right in respect to the possession of the land. They might have told the Court that they were ready to complete the agreement, and desired

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the acreage to be ascertained, and might have asked to be let into possession upon such terms with respect to payment of money into court or otherwise, as the Court should think fit. Here they have proceeded both under the compulsory clauses and by bill. The service of the notice and the entry into possession under the eighty-fifth clause implied that no agreement existed; and though I have little doubt that the service of the notice was a slip, still, as the Plaintiffs have taken the benefit of the eighty-fifth section, to which they were not entitled if a binding agreement subsisted between them and the Defendant, I am compelled to dismiss the bill; but having regard to the absence of any due notice by the Defendant that he intended to repudiate the agreement in consequence of the alteration in the line, and to the nature of the objections on which he has relied, it must be without costs.

RE GRANT'S TRUSTS.

July 26th.
Trustee Act,
 1850.—*Costs.*
 On a petition
 for appointment
 of new trustees
 of two trust
 funds, the costs
 ordered to be
 paid out of the
 two funds rate-
 ably.

THIS was a petition for the appointment of new trustees. There were two trust funds subject to different limitations.

Mr. *Marten*, for the petition :—

The costs should be out of the two funds in equal moieties. That rule was laid down in the case of *Ex parte Bishop of London* (a) as to costs on the investment of purchase moneys paid by several railway companies.

Mr. *Daniel*, Q.C., for the persons interested in the smaller fund.—The costs ought to be borne pro rata.

(a) 2 D. G. F. & J. 14.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I think, upon the principle that the appointment of new trustees is a step taken for the protection of the fund, the costs should be borne in proportion to the value of the funds. The appointment is in the nature of an assurance for the protection of the property, and, therefore, it seems fair that the costs should be borne rateably. The proceeding is of a different character from that before the Lords Justices.

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New trustees appointed. Costs to be paid out of the two funds in proportion to their value. *Minute.*

HALL v. RADCLIFFE.

IN this case one of several Plaintiffs had died, and a revivor order had been served on his legal personal representatives.

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Revivor Order.
—Appearance.
It is not necessary in any case to have an appearance entered to a revivor order.

Mr. *Wood* asked for leave to enter an appearance for the legal personal representative of the deceased Plaintiff, if the Court should think the appearance necessary. He referred to *Morgan's Practice*, p. 245, and to the cases there cited.

The VICE-CHANCELLOR said, that it was not necessary in any case for an appearance to be entered to a revivor order.

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Will—Preca-
tory Words—
Ejusdem generis
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By her will, a testatrix, after directing certain legacies in certain events to fall into the residue, bequeathed specified articles "and other personal effects" to A. and B., in confidence that they would distribute and dispose of them as she by memorandum or otherwise might direct, and appointed A. and B. her executors.

By a codicil, the testatrix directed her "executors and residuary legatees" to vary certain bequests, and empowered them to postpone legacies, the interest in the meantime "to form part of my residuary estate," and gave a legacy to "A. one of my executors and residuary legatees."

HARRIET LANCASTER made her will, dated the 17th of August, 1855, and thereby gave certain legacies of stock absolutely, including £200 Reduced 3l. per Cents. to *Harriet* and *Emily Nottidge*, and also a legacy of £600 Bank Stock, and £800 Reduced Annuities, to her niece *Melissa Gaitskell* for life, then to her husband for life; and afterwards the said stock to be divided between her nephew *A. H. Shepherd* and her niece *Mary Churchill*, and at their death to any lawful children they might leave; but if *Melissa Gaitskell* and her husband should survive them, then the said stock was "to fall into the residue of my property." Another stock legacy of £1,000 Reduced 3l. per Cents. was given to *Elizabeth Jenkins* for life, with a direction that at her death the stock was "to return to the residue of my property." The will also contained the following bequest:—"I give to *Frederick Peter Ripley* and *Ralph Clarke Nottidge* all my plate, linen, furniture, china, glass, wines, liquors, books, wearing apparel, trinkets, and other personal effects, in confidence that they will distribute and dispose of the same as I may, by memorandum or otherwise, direct or request. And I hereby appoint the said *Frederick Peter Ripley*, and the said *Ralph Clarke Nottidge* my executors." The will contained no other residuary bequest.

By a second codicil, the testatrix gave a life interest to a legatee in a sum, which, under the former dispositions, would have fallen into the residue, and stated that the alteration would make but little difference, as the sum would ultimately fall into the residue. After authorising the executors to postpone the payment of legacies, and giving other directions, the codicil concluded thus: "These wishes written by myself, and only concern the interest of my executors, will, I feel sure, be quite sufficient for them to fulfil all herein mentioned, but will perhaps be more correct if I sign my name in the presence of two witnesses, who are also in the presence of each other."

Held, that, on the will alone, the executors would have taken the residue, subject to a trust for the next of kin; but that the word "confidence" in the will admitted of explanation, and was explained by the codicils not to amount to a binding trust.

Held, also, that, on the will, as explained by the codicils, the bequest to the executors was not limited to things *ejusdem generis* with those described, but included the whole residue.

Held, consequently, that the executors took the whole residue beneficially.

By a codicil, dated the 16th of April, 1858, the testatrix revoked the bequest of the £600 Bank Stock and £800 Reduced Annuities, and gave the legacy to *Harriet* and *Emily Nottidge*, and also to *Melissa Gaitskell* for her separate use for life, and then to *Augustus Churchill* absolutely, "but in the event of his not surviving my said niece, then the same shall go to my nephew *Ralph Clarke Nottidge*, one of my executors and residuary legatees;" and after directing her "executors and residuary legatees" to vary certain legacies, the testatrix empowered her executors to postpone the payment of any legacies for seven or twelve months, "in which case any dividends or income accruing due in the meantime shall form part of my residuary estate;" and in all other respects the testatrix confirmed her said will.

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The testatrix made a second codicil, dated the 22nd of May, 1858, as follows :

"I *Harriet Lancaster* having omitted, in a codicil dated the 16th of April, 1858, to direct the disposal of £200 Three per Cent. Reduced Stock that I had left by my last will and testament, dated the 17th of August, 1855, to my two great nieces *Harriet* and *Emily Nottidge*, and in the above-named codicil I revoked it, and as it now stands it falls into the residue of my property, but I now hereby direct that it shall be added to the £1,000 Three per Cent. Reduced Stock, from which the interest as directed by my will is to be paid by my executors to *Elizabeth Jenkins* during her life, and now making the sum £1,200 Three per Cent. Reduced Stock, from which the interest is to be paid to the said *Elizabeth Jenkins* during her life, instead of only from £1,000 Three per Cent. Reduced Stock, as directed in the above-named will; and the alteration will make very little difference, as it will eventually fall into the residue, although not quite so soon. I also wish a little deviation to be made from the direction in the will as

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regards the choice of time to be taken as regards the payment of legacies, wishing that the servants may be paid what I have left them, and also to Mrs. *Jane Green* £100 left her, so soon as is convenient after my death. I conclude that the first payment to *Elizabeth Jenkins* will commence from the first dividend that becomes due on that stock after my decease, unless it should happen to do so within a very short time, say three months; but I am sure that my executors will do according to what they consider right, and what is customary, as she will have a tolerable sum to receive after my death to carry her on. Such servants as may not have been in my service two years, I do not consider entitled to more than the quarter's wages beyond what is due to them, and also the mourning, but nothing more, unless under any peculiar circumstances as regards much fatigue and great attention during a long time. These wishes written by myself, and only concern the interest of my executors, will, I feel sure, be quite sufficient for them to fulfil all herein named, but will perhaps be more correct if I sign my name in the presence of two witnesses who are also in the presence of each other."

The testatrix died on the 26th of March, 1860, and the will and codicil were proved by *Ripley* and *Nottidge*, the executors therein named.

The testatrix left a number of unattested memoranda purporting to dispose of plate and other articles, which were not admitted to probate.

Frederick Peter Ripley, one of the executors, died on the 7th of November, 1860.

The bill was filed by certain of the next of kin, and prayed a declaration whether the entire residue, or any and what part of it, passed to the executors, and whether for their own benefit or as trustees for the next of kin.

Sir *H. Cairns*, Q. C., and Mr. *Cracknall*, for the Plaintiffs:—

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There are two grounds on which the Plaintiffs might claim an interest as next of kin; one, that the residuary gift in the will is limited to matters ejusdem generis with those specified; the other, that the executors took as trustees.

As to the first point, I admit, that, having regard to the fact that the testatrix twice over directs legacies to fall, in certain events, into the residue, it would be impossible to contend that the residuary gift did not include the whole residuary personal estate; and I therefore concede that the executors took the whole, either beneficially or in trust. If this were not plain on the will, I do not think I could get over the language of the first codicil, which describes these executors as residuary legatees.

The only question, therefore, which I shall argue, is, whether they took beneficially or in trust. Now, first upon the will itself, it is clear that the words are sufficient to create a trust, which, as the objects of it are undefined, becomes a trust for the next of kin. The authorities are quite conclusive on this point: *Briggs v. Penny* (a).

Then all that remains is, to see whether either of the codicils revokes the trust created by the will. The first codicil clearly does not do so; for the description of an executor as one of the residuary legatees leaves the whole question open, whether they are legatees in trust or for their own benefit.

Then the second codicil contains nothing that can be regarded as a revocation of the trust imposed by the will. Whatever may be the meaning of the statement, that certain matters only concern the interest of the executors,

(a) 3 D. G. & S. 525; S. C., on App., 3 M. & G. 546.

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no vague words of this kind can possibly revoke a clear bequest upon trust. The word 'fulfil,' in the second codicil, itself points to a duty or trust to be performed.

If it were held that the residuary clause did not embrace the whole property, there would still be an implied trust for the next of kin, as there is nothing like the expression of intention required by the statute, that the executors should take beneficially: *Love v. Gaze* (a), *Saltmarsh v. Barrett* (b), *Juler v. Juler* (c).

Mr. Giffard, Q. C., Mr. Rodwell, Mr. Hoare, Mr. Robinson, and Mr. Beales, followed in the same interest.

Mr. Rolt, Q. C., and Mr. Ferrers, for the surviving executor and the executors of the deceased executor, (the surviving executor waiving any claim to survivorship):—

This is entirely a question of intention, to be gathered from the whole of the will and the two codicils. The point which Sir *H. Cairns* offered to abandon, viz. the limited nature of the residuary gift, would be rather in our favour, because, if the general residue was not given by the will, it clearly would pass by the codicils free from the words suggestive of a trust, which are found in the will alone. The first codicil would be quite sufficient to pass the whole by the use of the description "residuary legatees."

But supposing the will to include the whole, and not merely articles ejusdem generis with those enumerated, the question then is, not whether the codicils revoke the will, but how they explain it. The word "confidence," in the absence of anything to explain or limit it, is interpreted by this Court to mean a trust; but it is an ambiguous word capable of explanation, and the codicils show that the sense in which the testatrix used it, was not that of trust.

(a) 8 Beav. 472.

(b) 29 Beav. 474.

(c) Id. 34.

The first codicil alone is enough to prove this; for though a residuary legatee in trust may technically be said to be correctly described as a residuary legatee, no one would ever dream of using such a description, unless of a person who was a beneficial legatee.

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But the second codicil is conclusive, for the testatrix expressly says, that the executors alone are interested in the disposition of the residue; and that it is immaterial whether she signs the codicil, because she has left it entirely in the executors' power to fulfil or not to fulfil her wishes.

Mr. *Cracknall*, in reply.—It is clear that the will must first be construed, and then it must be seen whether the codicils vary the will as so construed. Now, the construction of the will beyond all question is, a gift upon trust; and the case is the same as if the word 'trust' had been used. Had that been so, it could not have been argued that these codicils would alter the disposition: and the trust therefore must be held to attach: *Inderwick v. Inderwick* (a).

VICE-CHANCELLOR SIR W. PAGE WOOD:—

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The question in this case is, whether, upon the true construction of the will and codicils of the testatrix, the general residue goes to the executors beneficially, or as trustees for the next of kin. Upon the will alone there could be very little doubt of the title of the next of kin. After giving various legacies, and, among other things, directing that in certain specified events some amounts of stock should fall into the residue, the testatrix concludes her will in these words: "I give to *Frederick Peter Ripley*

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and *Ralph Clarke Nottidge*, all my plate, linen, furniture, china, glass, wines, liquors, books, wearing apparel, trinkets, and other personal effects, in confidence that they will distribute and dispose of the same as I may by memorandum or otherwise direct or request. And I hereby appoint the said *Frederick Peter Ripley* and *Ralph Clarke Nottidge* my executors."

Upon this the question was raised, whether the whole residuary personalty was given by the terms of the express bequest, or whether the testatrix had not left the general residue to pass to the executors by virtue of their appointment. Arguments may be drawn from this last view in favour of either side; but I do not think that the point is very material, and I shall read the will as a gift of the whole residue to the executors in the confidence expressed by the testatrix. There is no doubt that this language is stronger than that which occurred in *Briggs v. Penny*, and that the will by itself could only be read as creating an absolute trust of the residue.

The first codicil is not in my opinion conclusive. Assuming the words of the bequest in the will to pass the entire residue, the description which is found in the codicil of *Nottidge*, as "one of my executors and residuary legatees," and the subsequent direction to the "executors and residuary legatees," would not be sufficient to give them the residue beneficially. All that this codicil does, is to explain that the testatrix, by the terms of the original bequest, meant to carry the whole residue to the legatees. To this extent the first codicil seems to interpret the will, and to remove any doubt as to the extent of the property comprised in the residuary gift.

On the question, whether the gift was intended to be for the executors' own benefit, the last clause of this codicil is adverse to them, because it is not likely that power would be given to them to postpone legacies for their own benefit.

In the second codicil, the testatrix begins by reciting that she had by the former codicil revoked a certain legacy, and that it would consequently "fall into the residue," and then proceeds to make a new disposition of the amount, observing that "the alteration will make very little difference, as it will eventually fall into the residue, although not quite so soon;" a kind of apology, in fact, which would not be very appropriate if the testatrix considered that she had made no disposition of her residue. But it is not necessary to dwell on an indication of this kind, because the last clause in the codicil seems to be quite decisive of the matter in issue. After giving certain directions as to the servants' legacies, introducing in the course of them the remark, "I am sure that my executors will do according to what they consider right and what is customary," the testatrix concludes with this remarkable, though not quite grammatical, sentence, "These wishes written by myself, and only concern the interest of my executors, will, I feel sure, be quite sufficient for them to fulfil all herein named, but will perhaps be more correct if I sign my name in the presence of two witnesses."

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This clause appears to me quite conclusive in favour of the executors. The authorities have no doubt very correctly decided, that such expressions as "in confidence," and the like, though not in ordinary language used as equivalent to a positive trust, must, in the absence of any contrary indication, receive that construction; but in laying down this rule, the Court has acted under the necessity of choosing between two constructions which such words might be supposed capable of bearing; the argument, in fact, used to be, that such language naturally imported nothing more than an honorable confidence, as distinguished from a legal trust. It is now settled, that, in the absence of anything to the contrary, such words are to be construed as creating an absolute trust. It does not, however, appear to me a sound argument, to say that, the meaning of the word

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taken by itself being fixed by authority, the intention to create a trust in the first instance must be imputed to the testatrix, and effect must be given to it unless the codicils show a subsequent change in that intention. Probably, there was no change of intention at all; but the codicils, nevertheless, throw much light on what was the original intention with which the words "in confidence" were used by the testatrix.

Assuming that the first codicil would have no effect upon the construction of the will, the second codicil explains, that, in using the words "in confidence" in the will, the testatrix meant a confidence which she felt in the legatees, irrespective of the power of any tribunal to compel the fulfilment of her wishes. I can give no meaning to the language of this codicil, unless I assume the testatrix to have intended the residue to go to the executors for their own benefit, subject only to such disposition as she might make of any part of it.

I therefore hold, that the entire residue was bequeathed to the executors for their own benefit; and the surviving executor not raising any question as to a joint tenancy, there will be a declaration that the residue is divisible between him and the representative of the deceased executor.

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ANNUITY.

Where, by a testamentary appointment under a power in a settlement, a charge was created and a term vested in trustees to raise the same by sale thereof—*Semble*, that the money could not be raised by a sale of the fee, though the term was insufficient for the purpose. But, a life annuity being granted in the same settlement by way of rent-charge, and it appearing that arrears which had accrued could not be otherwise satisfied, a decree was made for sale of the fee. *Hall v. Hurst*, 76

See WILLS, 8.

ANNUITY—PERPETUAL OR LIFE?

See WILLS, 9, 13.

ANSWER.

See PLEADING, 4.

ANTICIPATION.

See MARRIED WOMAN.

APPEARANCE.

See PRACTICE, 1, 6.

APPOINTMENT.

See WILLS, 10, 12, 16.

ARBITRATOR.

See AWARD.

AVERMENT OF TITLE.

See PLEADING, 5.

AWARD.

A. having brought an action against *B.*, and *B.*, a cross-action against *A.*, the same and all matters in difference were by a judge's order by consent referred. *B.* died pending the reference; and before administration could be taken out, the arbitrator, notwithstanding a protest, proceeded ex parte, and made an award directing payment of a sum of money and costs to *A.* *A.* had filed a creditors' bill for the administration of *B.*'s estate, founded upon the alleged debt under the said award:—*Held*, on demurrer, that a bill would not lie by *A.*'s executor praying that the bill in the creditors' suit might be dismissed, and the award set aside.

The Court of Chancery has no jurisdiction to set aside an award made under a reference of an action at law, whether the same be or be not under the statute 9 & 10 W. 3, c. 15. *Harding v. Wickham*, 676

BANK STOCK.

See INVESTMENT.

BANKERS.

See TRUSTEE & CESTUI QUE TRUST.

BANKRUPT.

See PLEADING, 6.

BANKRUPTCY.

A provision in a deed of partnership, that, in the event of the bankruptcy or insolvency of a partner, his share in a mining lease (forming part of the partnership property) shall go over to his co-partners, is void, as being in fraud of the bankrupt laws. *Whitmore v. Mason*, 204

BANKRUPTCY CONSOLIDATION ACT.

The order by the Court of Bank-

ruptcy for sale of goods as in the reputed ownership of a bankrupt is *ex parte*; and, *semble*, it cannot be appealed against by the true owner.

The Court of Chancery has jurisdiction (notwithstanding such order) to restrain a sale, and determine the rights of the parties.

An application by the true owner to the Court of Bankruptcy for a stay of proceedings—*held* not to be a bar to a subsequent bill for injunction to stay a sale. *Mather v. Loy*, 374

"BEFORE-MENTIONED LEGATEES."

See WILLS, 14.

BOOKS IN USE ABROAD.

See PRODUCTION, 3.

BURIALS.

See STATUTES, INTERPRETATION OF.

CESSER OF INTEREST.

See BANKRUPTCY.

CHAPTER LANDS, LEASE OF.

See LEASE OF CHAPTER LANDS.

CHARGE.

See ANNUITY.

CHARGE—DEVISE SUBJECT TO.

See WILLS, 6.

CHARGE—IMPLIED, OF REAL ESTATE.

See WILLS, 4.

CHARGE—UNDISPOSED OF

See WILLS, 3.

CHARITY.

A testator's share in the proceeds of land directed by a previous testator's will to be sold—*Held*, not to be land within the meaning of the Mortmain Act.

A bequest to the president and trustees of a school, to be applied in instructing youth in specified subjects: *Held*, not to fail by reason of the school having been closed before the testator's death or the date of his will. *Marsh v. Attorney-General*, 61

CHURCH BUILDING ACTS.

See STATUTES, INTERPRETATION OF.

CHURCHES.

See STATUTES, INTERPRETATION OF.

CLOSE DAYS.

See TIME, COMPUTATION OF.

CLASS, BEQUESTS TO.

See WILLS, 14.

CODICIL—WILL EXPLAINED BY.

See WILLS, 17.

COLONY—LAND IN.

See JURISDICTION, 1.

COMMON LAW PROCEDURE ACT.

See DISCOVERY.

COMPOSITION DEED.

See CONTRIBUTION.

COMPROMISE.

See DIVORCE, 2.

778 COMPUTATION OF TIME.

COMPUTATION OF TIME.

See TIME.

CONDITION.

See WILLS, 5.

CONDITIONS OF GIFT.

See WILLS, 15.

CONTEMPT, PROCESS OF.

See TIME, COMPUTATION OF.

"CONTRARY INTENTION."

See WILLS, 2.

CONTRIBUTION.

The creditors, parties to an inspection deed, severally covenanted to indemnify to a certain extent the inspectors against liabilities incurred in carrying on the business of the debtor, which they were empowered to do. One of the creditors who had executed the deed, and to whom the inspectors had incurred a large debt for goods supplied and advances made for the purpose of the business, filed a bill against the inspectors, the debtor, and all the other acceding creditors, to have the inspectorship wound up, and the accounts taken, and to have the assets applied in payment of his claim, and the deficiency made good by rateable contributions of all the acceding creditors (including the Plaintiff) in proportion to their debts:—

Held, that there was no right to contribution; and, a decree for accounts having been made in a previous suit, the bill was dismissed. *Selwyn v. Harrison*, 334

CONTRIBUTORY.

See WINDING-UP.

COVENANT.

CONVERSION OF FUND.

See HUSBAND AND WIFE.

COPYHOLD ENFRANCHISEMENT ACT.

See COPYHOLDS.

COPYHOLDS.

A railway company enfranchising under the provisions of the Lands Clauses Consolidation Act, 1845, is not bound by the provisions of the Copyhold Enfranchisement Acts, 1852 and 1858, requiring payment of fines to the lord as a condition of compulsory enfranchisement.

If a tenant for life of a manor obtains from a railway company payment of such fines, the sum received (not being legally enforceable against the company), cannot be retained by the tenant for life, but must be applied as part of the compensation for the benefit of the inheritance. *Re Wilson's Estate*, 619

CORPUS, PAYMENT OUT OF.

See WILLS, 8.

COSTS.

See LANDS CLAUSES CONSOLIDATION ACT, 2.

TRUSTEE ACT.
WILLS, 13.

CO-TRUSTEES, LIABILITY OF.

See TRUSTEE & CESTUI QUE TRUST.

COVENANT.

See LEASE.

COVENANT, TOTIES QUOTIES.

See LEASE OF CHAPTER LANDS.

CREDITORS' DEED.

CREDITORS' DEED.

See CONTRIBUTION.

CREDITORS—FRAUD ON.

See BANKRUPTCY.

CREDITORS' REPRESENTATIVE.

See JOINT-STOCK COMPANY, 2.

CREDITORS—RIGHTS OF.

See JOINT-STOCK COMPANY, 5.

CREDITOR'S SUIT.

See PLEADING, 7.

CROSS-EXAMINATION.

See PRACTICE, 4.

CUM ONERE.

See WILLS, 2.

CUSTODY.

See TRUSTEE & CESTUI QUE TRUST.

DAMAGES.

See DIVORCE, 2.
FRAUD.

DECLARATION OF TRUST.

A testator entered in a memorandum book, and signed a memorandum, that he had decided to invest the future proceeds of an annuity which had been absolutely assigned to him by his second son *F.*, and that he intended to leave the proceeds at his death to *F.*'s daughter.

An account, also in the testator's handwriting, was found, of the investments of the annuity "from the period that I determined thus to appropriate this money."

On his death-bed, the testator re-

DISCOVERY.

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ferred his eldest son to the account-book, and said that he wished the accumulations to be given to the daughter of *F.*, and the annuity at his death to revert to *F.* The annuity and accumulations were undisposed of by the will:—*Held*, that there was no declaration of trust, and that the annuity and accumulations went to the next of kin. *Re Glover*, 186

DETERMINATION OF TRUST.

See HUSBAND AND WIFE.

DECLARATORY DECREE.

See PLEADING.

DEER, RECLAIMED.

See PARK.

DEMURRER.

See PLEADING, 2, 5, 6.
PRACTICE, 2.

DEMURRER AND PLEA.

See PLEADING, 3.

DEPOSITS—APPROPRIATION OF, BY A SOLICITOR.

See MORTGAGE.

DEvised ESTATES IN MORTGAGE.

See WILLS, 2.

DISCOVERY.

The circumstance, that, by the present practice of Courts of common law, the Plaintiff might have obtained discovery at law as to the truth or falsehood of the averments in the bill, *held* not to oust the jurisdiction which previously existed in

the Court of Chancery to compel such discovery. *Barry v. Croskey*, 1.

See PLEADING, 6.

DISTRICT CHURCHES.

See STATUTES, INTERPRETATION OF.

DIVORCE.

1. By the settlement made in 1840, on the marriage of *C. M.* (the wife) and *H. B.* (the husband) a fund was settled upon the children of the said *C. M.* by the said *H. B.*, and in default as *C. M.* should appoint.

In 1860 the marriage was dissolved, there being then no issue to take:—*Held*, that the power of appointment arose, notwithstanding the alleged possibility of a re-marriage and future issue.

Whether a re-marriage after a decree of dissolution of marriage is lawful—*Quære. Bond v. Taylor*, 478

2. An agreement by a petitioner in a suit for dissolution of marriage, to withdraw from the suit in consideration of a sum of money paid and to be secured by the co-respondent, is a fraud on the statute, and void as against public policy. *Gipps v. Hume*, 517

DOCUMENTS.

See PLEADING, 4.
PRODUCTION.

DOMINANT AND SERVIENT TENEMENTS.

See EASEMENTS.

DOWER ACT.

The Dower Act (3 & 4 Will. 4, c. 105) extends to lands of gavelkind tenure. *Farley v. Bonham*, 177

"DOWER OR THIRDS"—PROVISION IN LIEU OF.

See MARRIAGE SETTLEMENT.

EJUSDEM GENERIS.

DRAFT VOLUNTARY SETTLEMENT.

See MARRIED WOMAN.

DURANTE VIDUITATE.

See WILLS, 5.

EASEMENTS.

The 3rd section of the Prescription Act (2 & 3 Will. 4, c. 71), limiting twenty years as the period for acquiring an indefeasible right to the access and use of light, is retrospective, so that such an easement may be acquired by virtue of enjoyment prior to the passing of the Act.

An union of the ownership of dominant and servient tenements for different estates does not extinguish an easement of this description, but merely suspends it so long as the union of ownership continues, and upon a severance of the ownership the easement revives.

Where a right to an easement of this description is acquired against the owner of a leasehold interest in the servient tenement, it is acquired also against the owner of the reversion.

A tenant from year to year may file a bill for an injunction to protect an easement of this description, but the injunction will be limited to the period of the continuance of the Plaintiff's tenancy. *Simper v. Foley*, 555

EAST INDIA STOCK.

See INVESTMENT.

ECCLESIASTICAL COMMISSIONERS.

See LEASE OF CHAPTER LANDS.

"EJUSDEM GENERIS."

See WILLS, 17.

ELECTION.

A testator, being entitled to a moiety of two farms, *T.* and *P.*, of which one-fourth belonged to *W.*, and the remaining fourth to *L.*, gave all his real and personal estate to his wife for life, with remainder to *L.* for life, and from and after his decease devised his farm *T.* to *W.* and *E.*, and gave them £200 towards rebuilding and repairing the buildings thereon, and devised his farm *P.* to the Plaintiffs. After the testator's death *L.* conveyed all his interest in the two farms, upon trust for himself and the testator's widow successively for life, with remainder upon trust for the Plaintiffs. *L.* died in the lifetime of the widow, who died shortly before the filing of the bill:—*Held*, that *W.* was put to his election. *Held*, also, that, in the events which had happened, *L.* and the Plaintiffs, as assignees of his interest, were not put to their election. *Howells v. Jenkins*, 706

See MARRIAGE SETTLEMENT, 2.
WILLS, 3.

ENTRY.

See RAILWAY COMPANY, 3.

ERRONEOUS RECITAL.

See WILLS, 15.

ESTOPPEL.

See JOINT STOCK COMPANY.

EVIDENCE.

See PRACTICE, 3, 5.
WILLS 11.

EXECUTORS.

See ADMINISTRATION.

EXONERATION.

See WILLS, 2.

EXTENSION OF OBJECTS OF COMPANY.

See JOINT STOCK COMPANY, 2.

FAILURE OF TRUST.

See CHARITY.

FALSE REPRESENTATIONS.

See FRAUD.

SPECIFIC PERFORMANCE.

FEME COVERTE.

See HUSBAND AND WIFE.

MARRIAGE SETTLEMENT.

MARRIED WOMAN.

FIRE POLICY.

See MORTGAGOR & MORTGAGEE, 1.

FIXTURES.

Greenhouses built in a garden and constructed of wooden frames fixed with mortar to foundation walls of brickwork—*Held*, to be fixtures, and not removable by the occupier who built them.

A boiler built into the masonry of the greenhouse also *held* to be irremovable; but the pipes of a heating apparatus, which were connected with the boiler by screws, *held* to be removable. *Jenkins v. Gething*, 520

FOREIGN FIRM.

See JURISDICTION, 3.

FOREIGN SUIT.

See JURISDICTION, 3.

FRAUD.

The principles by which, in the administration of justice, the limits of responsibility for the consequences of a false representation are to be ascertained, are these:—

First:—Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and, so acting, is injured or damaged.

Second:—Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damaged; provided it appear that such false representation was made with the direct intent that it should be acted on by such third person in the manner that occasions the injury or loss.

Third:—But, to bring it within the second principle, the injury must be the immediate, and not the remote, consequence of the representation thus made.

A bill averred, that Defendants, the directors and secretary of a projected railway company, having, partly by allotments to fictitious persons and partly by purchase, obtained possession of all the shares of a given class in the company, through their broker, induced Plaintiff, a stock jobber, to contract to sell them certain of such shares, to be delivered upon the "settling day" to be appointed by the committee of the Stock Exchange; and that they then, by false and fraudulent representations made by them in their official character to the committee of the Stock Exchange, procured the appointment of a settling day; upon the arrival of which, Plaintiff, being by reason of the scheme thus contrived by Defendants, unable to procure the shares he had contracted to deliver, except at a ruinous premium, was compelled to pay Defendants a sum specified in the bill to release him from his contract: and the bill prayed for a declaration, that such contract was fraudulent and void, or inoperative, and for repayment to

Plaintiff of the amount he had paid in respect thereof. The company having been joined as Defendants to the bill, upon the ground that they had adopted the fraudulent representations made by their directors and secretary to the committee of the Stock Exchange:—*Held*, on demurrer by the company, that, although the company might have benefited by the fraudulent representations, e. g. by obtaining a quotation and an increased price for their shares—and although, *semble*, they might be answerable for that increased price, or for any other direct advantage derived from such fraudulent representations—yet, it not being shown that the company knew such representations were made by their directors with intent to defraud the Plaintiff, by compelling him to perform his contract, or even that they knew of the existence of such a contract, the company were not responsible for the loss Plaintiff had thus incidentally sustained: and the company's demurrer was allowed.

But *held*, that the bill was not open to demurrer on the part of the other Defendants, as being a mere bill for the recovery of money.

Distinction, in this respect, between a bill of this description against a single Defendant, and a bill like the present, averring a combination of several Defendants, against some of whom Plaintiff may have a direct remedy at law, while against others he may have no remedy at law, or no remedy except by as many separate actions of deceit as there are parties Defendants to the suit.

Langridge v. Levy (2 Mee. & W. 519), explained. *Barry v. Croskey*,
1

See PLEADING, 6.

PRODUCTION, 2.

TRUSTEE & CESTUI QUE TRUST.

FRAUD ON CREDITORS.

FRAUD ON CREDITORS.

See BANKRUPTCY.

FUTURE INTEREST.

See PLEADING.

FUTURE PROPERTY—COVENANT TO SETTLE.

See MARRIAGE SETTLEMENT, 2.

"GAMING OR WAGERING" CONTRACTS.

See TIME BARGAINS.

GAVELKIND.

See DOWER ACT.
WILLS, 7.

HABEAS CORPUS.

See TIME, COMPUTATION OF.

HEIR.

See WILLS, 8, 7.

"HEIRS."

See SETTLEMENT.

"HEIRS"—CONSTRUCTION OF.

See WILLS, 7.

HOLIDAY IN TERM TIME.

See TIME, COMPUTATION OF.

HUSBAND AND WIFE.

Where personal property was bequeathed to a woman upon trust for her separate use, but without the intervention of any trustee, and she afterwards, being discoverte and sui juris, sold the stock, spent a portion of the proceeds, and invested the rest in shares of a Joint Stock Bank and

INTERPLEADER. 783

Canada bonds: *Held*, that by so doing she had determined the trust for her separate use. *Wright v Wright*, 647

See MARRIAGE SETTLEMENT.

IMPLIED BEQUEST—INTEREST.

See WILLS, 1.

IMPLIED CHARGE.

See WILLS, 4.

INDORSEMENT.

See PRACTICE, 1.

INJUNCTION.

See EASEMENTS.
PLEADING, 2.

INJURY TO THIRD PARTIES.

See FRAUD.

INSPECTION DEED.

See CONTRIBUTION.

INSURANCE, MARITIME.

See SHIPPING.

INTEREST.

See MORTGAGE AND MORTGAGEE, 1.
WILLS, 1, 13.

INTERPLEADER.

Where a Plaintiff in an interpleader suit had previously set up a claim of lien, and had pleaded it in defence to an action at law:—*Held*, that this was no bar to an interpleader order being made on the terms of the Plaintiff withdrawing his plea and paying the costs at law and in equity

up to the time of such withdrawal.
Jacobson v. Blackhurst, 486

INTERROGATORIES.

See PRACTICE, 1.

INVALID DEBENTURES.

See JOINT STOCK COMPANY, 1.

INVESTMENT.

1. A trust fund invested in Consols was paid into court under the Trustee Relief Act. On the petition of the tenant for life to change the investment into *East India* or Bank Stock, and for payment of the dividends to him, a transfer into Bank Stock was, under the circumstances, ordered; and, a petition being otherwise necessary, the costs were directed to be paid out of the corpus. *Re Langford's Trust*, 458

2. The 32nd section of the Act 22 & 23 Vict. c. 35, enabling trustees, in certain cases, to invest their trust funds in Bank Stock, or *East India* Stock, does not apply to a case where the trust fund is already invested in Bank Annuities, and the trustee has no power, independently of the Act, to vary any investment. *In Re Warde*, 191

ISSUE.

See WILLS, 11.

JOINT STOCK COMPANY.

1. Debentures were issued by a company, in payment for work, to *S.*, who was styled an honorary director, and had acted on the board, but whose name was not inserted in the registered list of directors. *S.* assigned to *H.*, who had no notice that *S.* had acted in any way as director. *H.* recovered judgment in *S.*'s name in an action against the company for

interest on the debentures, the dealings with *S.* having been disclosed to the shareholders by a previous report. *S.* having become bankrupt, and the company being in course of winding-up—*Held*, that *H.* was entitled to prove on the debentures. *Re South Essex Gas Light and Coke Company: Hulett's Case*, 808

2. A joint stock company was formed under a deed describing its business as life assurance. Resolutions of extraordinary general meetings were regularly passed and confirmed for extending the business to marine insurance. The marine business was mentioned in the annual returns to the Registry-office, and referred to in reports and circulars, and on one occasion a report on the marine business was sent out with the dividend warrants. A deed extending the purposes of the Company to sea risks was executed by some only of the shareholders; but it did not appear that any shareholder had objected to the marine business being carried on. About one and a half years after the commencement of the marine business the Company was wound up:—*Held*, that there was no such acquiescence by the shareholders as to entitle the holders of marine policies to prove in respect of them.

Held, also, that the premiums paid might be proved against the Company.

Semble, the business of a joint stock company cannot be extended beyond its original objects as defined by the deed of settlement, except by a supplemental deed executed by all the shareholders.

The Creditors' Representative cannot be heard to support the claim of a class of persons to rank as creditors. *Re Phoenix Life Assurance Company: Burges and Stock's Case*, 441

3. The proviso contained in the

Winding-up Amendment Act, 1849, requiring the petitioners, in the case of cost-book mines within the jurisdiction of the Court of Stannaries in Cornwall to be owners of one-tenth of the shares, is not extended to mines in Devon by the 18 & 19 Vict. c. 12, which brought that county within the Stannary jurisdiction. *Semble*, also, the said proviso is not repealed by the 20 & 21 Vict. c. 78, s. 12, which requires the leave of the Court of Chancery or the certificate of the Vice-Warden to a petition to wind up in Chancery a mine subject to the Stannary jurisdiction.

Principles on which a statute may operate as an implied repeal of a previous statute considered.

The leave of the Court required by 20 & 21 Vict. c. 78, s. 12, may be granted on the ground that the Stannaries Court has no jurisdiction to stay proceedings by creditors against individual shareholders.

It is not necessary that the fact of such leave having been obtained should be stated on the petition, or that notice thereof should be given to the respondents. *Re South Lady Bertha Mining Company*, 376

4. A life and fire assurance society purchased the business of a life assurance company, taking all the assets, and undertaking all the liabilities:—*Held*, that, in the absence of any special power in their deed of settlement, the transaction was ultra vires,—that securities under the seal of the purchasing company, given in carrying out this arrangement to creditors of the selling company were void; and that such creditors were not entitled to prove against the purchasing company, which was in the course of winding up. *Re Era Assurance Society: Williams' Case, Anchor Case*, 400

5. An Insurance Company purchased

the business, received the assets, and undertook the liabilities of another Insurance Company. A creditor of the selling company cancelled his security, and accepted a substituted security of the purchasing company. The purchase having been held void as ultra vires: *Held*, that the Court has jurisdiction to relieve against a mistake in law, and that the creditor was remitted to his original rights against the selling company, and was entitled to prove in winding-up proceedings.

The purchasing company having actually received all the assets, and taken the business of the selling company, and both companies having since been wound-up:—*Held*, that the purchasing company was not entitled to prove against the selling company an excess of debts paid over assets received—it being impossible to restore both companies to their original situation.

The Creditors' Representative is entitled to appear on an adjourned summons by the Official Manager, to establish a debt claimed to be due to the company. *Re Saxon Life Assurance Society: Anchor Case, Era Case*. 408

6. In a case where there is a clear contract to accept shares, and the remedy at law is shown to be inadequate, the Court will decree specific performance.

But where the validity of the contract to accept the shares was doubtful, and the inadequacy of the legal remedy not clearly made out, and there having been an unexplained delay of two years, a demurrer to a bill for specific performance of a contract to accept shares was allowed with costs. *Oriental Inland Steam Company (Limited) v. Briggs*, 625

JURISDICTION.

1. Where land in a colony is vested

in the Queen by a Colonial Act for the public purposes of the colony, the Petitions of Right Act, 1860, does not give jurisdiction to the Court of Chancery to entertain proceedings against the Crown as a trustee of such land present within the jurisdiction of the Court.

By a Canal Act of the Provincial Legislature of *Canada*, land taken for a canal was vested in the Queen. By a second Provincial Act the land so taken was vested in the officers of Her Majesty's Ordnance; and it was enacted that so much of the land taken as had not been used for the canal, should be restored to the owners. By a third Provincial Act the lands were re-vested in the Queen for the purposes of the colony, and subject to future colonial legislation.

To a petition of right by suppliants claiming the restoration of certain lands taken for the canal from their predecessors in title, but not used, a demurrer was allowed on the ground that the Courts of this country had no jurisdiction. *Re Holmes*, 527

2. The Court has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, the legal remedy being inadequate. But where, by the terms of an agreement and the frame of the pleadings, the Plaintiff, an artist, seeking restitution of a picture, had, in effect, put a fixed price upon it—*Held*, that damages would be an adequate remedy, and that there was no jurisdiction in a Court of Equity to interfere. *Dowling v. Betsjemann*, 544

3. *A.*, a resident in *England*, and the sole member of a *Liverpool* firm, entered into a partnership with *B.* and *C.*, residents in *Hayti*, in a business to be carried on at *Hayti*. The *Liverpool* firm acted as the agents of the *Haytian* firm. *B.* was admitted

as a partner in the *Liverpool* firm, *C.* died, and the winding up of the *Haytian* firm was committed by agreement to *A.* and *B.* Then *A.* died, leaving *B.* sole survivor in each firm. *B.* and the *Haytian* legal representatives of *C.* engaged in cross suits in *Hayti*, in which certain settled accounts were established. The representative of *A.*, whose assets were all in *England*, was not a party to the *Haytian* suit.

Held, on a bill filed by the administrator of *C.* in *England*, that there was jurisdiction in the Court of Chancery to wind-up the partnership in *Hayti*, and to take the accounts of that firm, and of the agency of the *Liverpool* firm; and decree accordingly.

Held, also, that the law of *Hayti* was to regulate the transactions of the *Haytian* firm. *Maunder v. Lloyd*, 718

See AWARD.

BANKRUPTCY CONSOLIDATION ACT.

FRAUD

INTERPLEADER.

JOINT STOCK COMPANY, 5.

LUNATIC.

KEEPER OF THE QUEEN'S PRISON.

See TIME, COMPUTATION OF.

KENT—LANDS IN.

See DOWER ACT.

WILLS, 7.

LANDLORD AND TENANT.

See FIXTURES.

LANDS—AFTER ACQUIRED.

See WILLS, 3.

LANDS CLAUSES CONSOLIDATION ACT.

1. A landowner, who, upon being served by a company with notice to treat for a part of his property, replies by claiming a given sum for the part, is not thereby precluded, if that sum be refused, from asserting his right, under the 92nd section of the Act, to require the company to take the whole. *Gardner v. The Charing Cross Railway Company*, 248

2. A vendor possessed of an estate in fee, of which part was in mortgage, contracted to sell in fee simple to a railway company a portion of the estate. This portion was chiefly free from the mortgage, but on investigating the title the company ascertained that a small part of it was comprised within the mortgage, which was vested in the trustees of a will in course of administration by the Court. The vendor applied in the suit for, and obtained the sanction of, the Court to the release of the purchased land from the mortgage:—*Held*, that the company was bound to pay the costs of the application. *Re London and South Western Railway Act*, 1855, 890

See COPYHOLDS.

RAILWAY COMPANY, 3.

LEASE.

By a deed of even date with a lease, the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee:—*Held*, that though the covenant might be pleaded at law as a release pro tanto of the rent, this was only to avoid circuity of action, and the covenant was not for all purposes a release. Therefore, the lessee having specifically bequeathed the premises subject

to the rent:—*Held*, as between the executors and the specific legatees, that the specific legatees took subject to the whole rent, and that the benefit of the covenant for reduction of rent went to the executors. *Ledger v. Stanton*, 687

LEASE OF CHAPTER LANDS.

A lessee for lives from a dean and chapter without a covenant for perpetual renewal granted an underlease, for the same lives, of part of the premises with a toties quoties covenant, at a fixed fine. The reversion having become vested in the Ecclesiastical Commissioners, they refused to renew, but offered to sell the reversion. The lessee purchased: *Held*, that the sublessee was not entitled to perpetual renewal at the specified fine, but was entitled to a conveyance of the reversion on the terms of paying a due proportion of the consideration and expenses of the purchase, regard being had to his existing interest, and the extent of the property comprised in his lease.

Inquiry directed as to the amount. *Postlethwaite v. Lewthwaite*, 287

LIEN.

See INTERPLEADER.

LIFE POLICY.

See MORTGAGOR & MORTGAGEE, 1.

LIGHT AND AIR.

See EASEMENTS.

LOCAL ACTS—INTERPRETATION OF.

See STATUTES.

LOCAL GOVERNMENT ACT, 1858.

See MARKET.

LOCKE KING'S ACT.

See WILLS, 2.

LOCUS PENITENTIAE.

See MARRIED WOMAN.

LUNATIC.

Applications relating to the property of persons of unsound mind not found lunatics by inquisition, which is in or under the administration of the Court of Chancery, are entertainable by the Court in its ordinary jurisdiction.

Re Irby, 17 Beav. 384, not followed.

Where a person of unsound mind, not found lunatic by inquisition, had been wholly maintained by his father at an expense, since the attainment of his majority, greater than the value of a sum of stock belonging to him, which had been paid into court under the Trustee Relief Act, and which constituted his whole property, the stock was ordered to be sold and paid to the father, in part satisfaction of the moneys expended by him upon his son's past maintenance, upon his undertaking to continue the maintenance for the future. *Re Macfarlane*, 673

MAINTENANCE.

See LUNATIC.

MARITIME INSURANCE.

See SHIPPING.

MARKET.

A corporation, being lords of a market and owners of the soil, is entitled at common law to remove the market; but where the corporation, acting as a local board, takes steps under the statute to set up a market in a new place, it can only act under the powers and subject to the provisions of the statute, and is not

MARRIAGE SETTLEMENT.

entitled to fall back upon its common law right. Whether the immemorial privilege of householders, of erecting and hiring out stalls in front of houses in a market-place, is a right protected by the proviso in the 50th section of the Local Government Act—*Quere.*

Semble, the setting up of a new market, under the statute, at a short distance from and in lieu of an ancient market, is an establishment of a market within the 50th section, and not a mere removal. *Ellis v. Corporation of Bridgnorth*, 67

MARRIAGE.

See STATUTES, INTERPRETATION OF.

MARRIAGE, RESTRAINT ON.

See WILLS, 5.

MARRIAGE SETTLEMENT.

1. The word "thirds" is not confined to real estate, but is a general expression, which may signify, according to the context and scope of the instrument, the interest of a widow in any property, whether personal or real, of her deceased husband.

In construing a stipulation in a marriage settlement, that the provision thereby made for the intended wife is "in lieu of dower or thirds," the Court considers (*inter alia*) the fund out of which the provision was made.

Where, therefore, by antenuptial settlement, the provision thereby made for the intended wife was partly charged on personalty of the intended husband, who had children by a former marriage—*Held*, on his dying intestate, that the claim of his widow to a distributive share in his personal estate was barred by a stipulation in the above words. *Thompson v. Watts*, 291

2. A marriage settlement contained a recital of an agreement that the

MARRIAGE SETTLEMENT.

husband should covenant to settle future property coming to the wife, followed by an agreement by all parties, and a covenant by the husband, that the wife's future property should be settled:—*Held*, that property bequeathed to the wife's separate use was bound by the covenant. The mere omission of a recital of an intention that the wife should covenant, *held* not to narrow the construction.

A married woman having, by her marriage settlement, executed when a minor, covenanted to confirm the settlement and also to settle future property, and having acquired by bequest personal property to her separate use: *Held* bound to elect either to bring the bequest into settlement, or to make compensation out of certain reversionary personalty and other property to which she would be entitled under the settlement for her separate use with a restraint on anticipation.

The covenant being to settle "any real or personal estate or effects" on trusts for sale and investment:—*Held*, that no exception could be implied as to specific jewels. *Willoughby v. Middleton*, 844

See SETTLEMENT.

MARRIED WOMAN.

A married woman *S.* was entitled to a gross sum, payable on the death of her father for her separate use, subject to a restraint on anticipation. During her father's life, she promised by letters to repay to *D.* out of the fund, when it fell in, advances made by him to her and her husband. After the death of her father the fund was paid into court, and *S.*, being still under coverture, verbally promised *D.* that he should be paid out of the fund if he would offer no opposition to her application for payment out of court; and it was accordingly paid to her:

MONEY, BILL TO RECOVER. 789

Held, that *D.* had no charge on the fund, the letters being ineffectual by reason of the restraint on anticipation, and the subsequent parol promise being void for want of consideration and under the Statute of Frauds.

Upon evidence that a married woman desiring to execute a voluntary settlement transferred stock, to which she was entitled for her separate use, into the names of trustees, and approved of a draft declaration of trust: *Held*, that there was a locus penitentiae, and that the trusts did not attach, unless the draft had been finally authorised before the transfer to the trustees; and an inquiry to that effect being answered in the negative, the fund ordered, on the petition of the married woman, to be retransferred for her separate use. *Re Sykes's Trust*, 415

See HUSBAND AND WIFE.

MARRIAGE SETTLEMENT.
WILLS, 10.

MASTER—LIABILITY OF, TO ACCOUNT.

See SHIP.

MINERALS.

See RAILWAY COMPANY, 2.

MINING LEASE.

See BANKRUPTCY.

MISREPRESENTATION.

See FRAUD.

SPECIFIC PERFORMANCE.

MISTAKE.

See WILLS, 11.

MISTAKE IN LAW.

See JOINT STOCK COMPANY, 5.

MONEY—BILL TO RECOVER

See FRAUD.

MORTGAGE.

A first mortgagee joining in a sale by a subsequent mortgagee, executing conveyances, and signing receipts for the purchase money of lands in mortgage—*Held*, not accountable either to the mortgagor or to the subsequent mortgagee in respect of deposits, which, pursuant to the conditions of sale, the purchasers had paid to the solicitor, and with which the solicitor had absconded.

And, *Semble*, under such circumstances it is immaterial whether the solicitor acted in the transaction as agent also for the first mortgagee, *Barrow v. White*, 580

See LANDS CLAUSES CONSOLIDATION ACT, 2.
WILLS, 2.

MORTGAGOR AND MORTGAGEE.

1. A mortgagee in possession is not entitled, in the absence of express contract, to charge in account premiums on a fire policy on the mortgaged property.

Where a decree in a foreclosure and redemption suit directed an account of principal, interest, and costs, including premiums paid on a life policy, which had been delivered to a trustee for the mortgagee as a further security, and proceeded in the common form, "on the Plaintiff paying what shall be found due for principal, interest, and costs:" *Held*, that the mortgagee was entitled to charge interest, at 4l. per cent., on the premiums so paid by him or his trustee, within six years before the certificate. *Bellamy v. Brickenden*, 137

2. Agreement in writing not to call in a mortgage for two years, the mortgagor fulfilling his covenants. On one occasion within the two years, the interest was not paid on the day and the mortgagor shortly afterwards,

after giving notice that he was no longer bound by the agreement, demanded and received payment of the interest and incidental costs:—*Held*, that this was a waiver of the default; and injunction granted to restrain an ejectment brought within the two years. *Langridge v. Payne*, 423

MORTMAIN.

See CHARITY.

MULTIFARIOUSNESS.

See PLEADING, 5.

MULTIPLICITY OF ACTIONS.

See FRAUD.

NEGATIVE PLEA.

See PLEADING, 4.

NEGOTIABLE SECURITIES.

See TRUSTEE & CESTUI QUE TRUST.

NOTICE TO TREAT.

See LANDS CLAUSES CONSOLIDATION ACT, 1.

RAILWAY COMPANY, 3.

ORDERS—CONSOLIDATED GENERAL.

Order v., Rule 6.

See TIME, COMPUTATION OF.

Order xiv., 9.

See PLEADING, 3, 4.

Order xxxvii., Rule 12.

See TIME, COMPUTATION OF.

ORDER 37—OF AUG., 1841.

See PLEADING, 3, 4.

ORDER—OF FEB. 5, 1861.

Rule 19.

See PRACTICE, 3, 5.

ORDER AND DISPOSITION

ORDER AND DISPOSITION.

See BANKRUPTCY CONSOLIDATION ACT.

ORDER IN COUNCIL—ULTRA VIRES.

See STATUTES, INTERPRETATION OF.

ORDER TO TURN OVER.

See TIME, COMPUTATION OF.

PARK.

Deer in a park, when reclaimed, become personal chattels and cease to be parcel of the inheritance.

Therefore, in a suit by incumbrancers of a tenant for life of a deer park and other property, an application by remaindermen to prevent the receiver from letting the park except as a deer park, and with proper covenants for preserving the deer, was refused, on evidence that the deer were reclaimed.

Consideration of circumstances which amount to a reclaiming of deer for this purpose. *Ford v. Tynte*, 150

PART OWNER.

See ELECTION.

PARTIES.

See PLEADING, 2, 6.

PARTNERSHIP.

See PLEADING, 4.
PRODUCTION, 1.

PARTNERSHIP DEED.

See BANKRUPTCY.

PETITIONS OF RIGHT ACT.

See JURISDICTION, 1.

PICTURE.

See JURISDICTION, 2.

PLEA AND DEMURRER. 791

PLAINTIFF ABROAD.

See PRODUCTION, 3.

PLEA AND DEMURRER.

See PLEADING, 3.

PLEADING.

1. Mode of framing a special case so as to enable the Court, in some cases, to make a declaration, in the lifetime of a tenant for life, with regard to the interest of a party claiming in remainder.

Although, in the lifetime of a tenant for life, the Court has no jurisdiction, upon a special case, to declare, whether an interest limited in remainder is vested or void for remoteness, yet it is competent to the Court to declare, "Whether the person claiming in remainder takes such an interest in the property in question, as to entitle him to file a bill to have it secured for his benefit." *Bell v. Cado*, 122

2. The Plaintiff and another person who carried on distinct trades at different places of business, had derived from a common predecessor in their respective businesses, the right to use the name of *Dent* as a trade mark. The Defendants having infringed this right:—*Held*, on demurrer, that the Plaintiff, without averring special damage, might sue alone for an injunction, and for the delivery-up of the articles so marked, to have the name erased.

Held, also, that he might sue alone for an account of profits made by the Defendant out of articles so marked, and for payment to the Plaintiff of such part of such profits as the Plaintiff should be entitled to.

If other parties are necessary for any part of the relief prayed, that is sufficient to sustain a demurrer for want of parties; and it is no answer to such demurrer to say, that that part of the relief may be waived at the hearing. *Dent v. Turpin*, *Tucker v. Turpin*, 139

3. Notwithstanding the 37th Order of Aug. 1841, a Defendant is not at liberty to plead to the whole bill, and also to demur to the whole bill.

A creditor of a limited company in course of being wound-up voluntarily, may file his bill in this Court to have his claim declared valid, and to restrain the voluntary liquidators from expending the assets of the company in paying other debts of the same degree.

Plea to such a bill, that, by the Joint-Stock Companies Acts, 1856, 1857, and 1858, the cognizance of the matters in question belongs to the Court of Bankruptcy, overruled with costs. *Loundes v. The Garnett and Moseley Gold Mining Company of America (Limited)*, 282

4. To a bill for accounts of an alleged partnership between Plaintiff and Defendant, the Defendant put in a plea of no partnership, accompanied by an answer in which the defences of laches and the Statute of Limitations were taken:—*Held*, that, notwithstanding the 37th Order of Aug. 1841, the plea and answer was bad for duplicity, that Order being intended to prevent failure of justice from accidental slips, not to justify two distinct defences by plea and answer. The answer also admitted certain specific documents, which tended to prove the case of partnership, and further admitted the possession of documents mentioned in a schedule to an affidavit referred to (which documents the Defendant declined to produce), and, save as appeared by the said schedule, denied the possession of any relevant documents. The bill contained no charge of books and papers, but there was an interrogatory on the subject: *Held*, that the answer did not give the discovery required to support a negative plea, and the plea ordered to stand for an answer. *Mansell v. Feeney*, 313

5. Plaintiff filed a bill for the administration of the trusts of a creditors'

deed, and for relief against a purchase (alleged to be fraudulent) by one of The Defendants from the trustee.

The Plaintiff alleged that he was the assignee of the debt of a Defendant who had executed the deed as a creditor, and who admitted the Plaintiff's title:—*Held*, on a demurrer by the purchaser, that this was an insufficient averment of title.

No collusion in the purchaser's fraud was alleged against the trustee, but it was averred, that, after he discovered the fraud, he refused and still refuses to take proceedings against the purchaser, but the bill did not state by whom he was asked to do so:—*Held*, also, on demurrer by the purchaser, that this was not sufficient to entitle the Plaintiff to sue. *Semble*, that a refusal by the trustee to sue on the application of a cestui que trust would have sufficed to sustain the bill on this point.

Held, also, that the bill was multifarious for joining a prayer for accounts with that for relief against the purchaser.

The 9th section of the Statute of Frauds refers to assignments by the cestui que trust. *Jerdein v. Bright*, 325

6. A bill was filed against a bankrupt and his assignees, seeking to set aside certain conveyances as having been fraudulently procured by the bankrupt before the bankruptcy:—*Held*, on demurrer, that the charge of fraud did not make the bankrupt a proper party.

Held, also, that although a decree declaring the deeds to be fraudulent would in a sense make the bankrupt a trustee of the property, this was not sufficient to make him a proper party to the suit.

Semble, a bankrupt cannot be made a party to a suit against his assignees for the purpose of discovery. *Gilbert v. Lewis*, 452

7. A creditor cannot have a decree

for the administration of real estate unless he sues on behalf of all creditors. *Ponsford v. Hartley*, 736

See PRODUCTION, 2.

POLICY.

See MORTGAGOR & MORTGAGEE, 1.
SHIPPING.

POWER.

See INVESTMENTS.
WILLS, 10, 12, 13.

POWER OF SALE.

See MORTGAGE.

PRACTICE.

1. Where Plaintiff requires an answer to an amended bill, he must serve the Defendant with a copy of such bill indorsed in the form or to the effect set out in the schedule to the Act 15 & 16 Vict. c. 86, requiring him to enter an appearance within eight days.

Service of a plain instead of an indorsed copy of such an amended bill is, in effect, an intimation to the Defendant, that no answer is required of him; and subsequent service of an indorsed copy and interrogatories is irregular, and may be set aside on motion by Defendant.

Course which Plaintiff should adopt to correct such an irregularity. *Barry v. Croskey* (No. 2), 130

2. Where the demurrer of one of several Defendants has been allowed absolutely, the bill being retained against the rest, the former is entitled, upon motion for that purpose, to an order directing the Clerk of Records and Writs to strike his name out of the record of the bill. *Barry v. Croskey* (No. 3), 136

3. The non-production of a witness for cross-examination is no ground for a postponement of the hearing, if the affidavit of the witness be withdrawn. *Sykes's Trust*, 415

4. In order to obtain an inquiry, with a view to a decree for wilful default at a future stage of the suit, the Plaintiff must rest upon one or more specific charges.

The observations in *Coope v. Carter* (2 D. M. G. 298) were not meant to let in general allegations of default, but to meet the case of specific allegations imperfectly proved at the hearing.

Therefore, where a widow and executrix was empowered by will to carry on testator's trade, did so for a short time, and her co-executors, in answer to an allegation that the book debts had not been got in, stated that the widow had got in some, that they believed the rest were bad, but that they had taken no steps themselves to recover any:—*Held*, that a sufficient case was not made to justify any inquiry as to wilful default. *Massey v. Massey*, 723

5. A witness who has made an affidavit may be cross-examined either before one of the examiners of the Court or a special examiner, and in the case of a witness abroad the proper course is to apply for a special examiner.

Time will not be enlarged to allow of affidavits in reply being filed after cross-examination of a witness on the other side. *Edwards v. Spaight*, 617

6. It is not necessary in any case to have an appearance entered to a revivor order. *Hall v. Radcliffe*, 765

See PLEADING, 7.

SECURITY FOR COSTS.

PRECATORY WORDS.

See WILLS, 17.

PRESCRIPTION ACT.

See EASEMENTS.

PRIORITY.

See WILLS, 4.

PRISONER—ORDER TO TURN OVER.

See TIME, COMPUTATION OF.

PRIVILEGE.

See PRODUCTION, 2, 3.

PROCEEDS OF SALE OF LAND.

See CHARITY.

PROCESS OF CONTEMPT.

See TIME, COMPUTATION OF.

PRODUCTION.

1. The Court accepts the oath of a Defendant whether documents are relevant; but the Plaintiff has a right to judge for himself whether they will assist his case, and is entitled to the production of all relevant documents, except such as the Court can clearly see to have no bearing on the issue.

Where a Defendant by affidavit admitted documents to relate to the matters in question in the suit, but denied that they tended to prove the Plaintiff's case (an alleged partnership), or that the Plaintiff's name appeared in them—Production ordered, with liberty to seal up money items in the accounts. *Mansell v. Flency* (2), 320

2. A bill averred that the Defendant procured the execution of a jointure-deed under a power by pressure, in fraud

of the power, but there was no allegation that the solicitor who prepared the deed was a party to the fraud—*Held*, that the alleged fraud was not such as to exclude the instructions given by the Defendant to her solicitor for the preparation of the deed from privilege. The bill was framed for the purpose of setting aside this deed; and among the communications as to which privilege was claimed were letters dated a considerable time before the transaction which the bill sought to set aside, but which the Defendant, in her answer, described as having been written for the purpose of obtaining professional assistance as to, and with a view to, her defence against any claim that the Plaintiff might make against her. It appeared, however, on the face of the bill and answer, that a contest had previously existed as to matters intimately mixed up with the transaction which the bill sought to set aside—*Held*, that, under these circumstances, the dates were not sufficient to rebut the privilege claimed.

The Defendant was interrogated as to the instructions given to her solicitor for the above-mentioned deed, and also as to communications with reference thereto between herself or any persons on her behalf, and any persons acting on behalf of the grantor of the jointure. In her answer she ignored "save as herein and in the schedule hereto appears." By a subsequent clause as to documents generally, she claimed privilege for letters written by and to her solicitor, but in other parts of the schedule as to which privilege was not claimed, were some documents which might satisfy the description of communications with third parties—*Held*, that the form of the answer was no bar to the privilege claimed. And *semble*, that, even if there had been no documents mentioned in the schedule free from the

PRODUCTION.

claim of privilege to answer the description of the communications with third parties inquired after, this would be only ground for exceptions, and not for production of the documents as to which privilege was claimed.

Macintosh v. Great Western Railway Company distinguished. *Mornington v. Mornington*, 697

3. Confidential letters, which, after the matters in the suit arose, and with reference thereto, were sent by a Plaintiff resident abroad to his agents in *England*, to be communicated to his solicitor:—*Held*, to be privileged.

In order to establish privilege as to letters sent by the agent to the Plaintiff:—*Semble*, that they must appear to have been sent in consequence of communications from the solicitor.

The same practice applies as to the production of books, whether abroad or in *England*.

It is not sufficient, in order to avoid production in *London*, to state that books are in constant use, without stating that they cannot be removed without inconvenience. *Hopper v. Gumm*, 602

PROFITS.

See SHIP.

PROMOTER'S CONTRACT.

See RAILWAY COMPANY, 3.

PUBLIC COMPANY.

See FRAUD.

PUBLIC POLICY.

See DIVORCE, 2.

PURCHASE OF ANOTHER COMPANY'S BUSINESS.

See JOINT STOCK COMPANY, 4, 5.

RAILWAY COMPANY. 795

PURCHASE MONEY, RECEIPT OF.

See MORTGAGE.

QUEEN'S PRISON, KEEPER OF.

See TIME, COMPUTATION OF.

RAILWAY COMPANY.

1. Two groups of railway companies being respectively the owners of independent continuous routes agreed to divide the profits of the whole traffic in certain fixed proportions, calculated on the experience of the past course of traffic:—*Held*, that such an agreement being *bonâ fide*, was not *ultra vires*.

Whether a Plaintiff, who, as shareholder in one company, has, with full knowledge, received profits under an agreement between that company and others, can afterwards, on purchasing shares in one of the other companies, parties to the agreement, sustain a bill, on behalf of all shareholders in such company, impeaching the agreement as *ultra vires*; more especially, if it appear that he is really suing in collusion with one of the companies, parties to the agreement—*Quære. Hare v. London and North-Western Railway Company*, 80

2. The *Leeds and Selby Railway Company* purchased land and the right of tunnelling under other land, and took a conveyance thereof "according to the true intent and meaning of their Act." Their Act provided, that conveyances should not pass minerals, and that the owners might work minerals *under the railway*, doing no damage to the railway. The *York and North Midland Railway Act* contained clauses excluding minerals from their conveyances, and providing that the owners desiring to work minerals under the railway might do so, *doing no wilful*

damage, and not working in an improper manner, with a proviso, as to minerals under or within forty yards of the line, that twenty-one days notice of such intention should have been given, and that the company should not have elected to purchase the minerals. After the before-mentioned conveyance the *Leeds and Selby Railway* was sold to the *York and North Midland Railway Company* under the powers of an Act, which, by sect. 4, repealed the *Leeds and Selby Company's* Act, subject to a proviso that all purchases, sales, conveyances, &c., should remain as effectual as if the said Act had not been repealed, and also contained clauses transferring all the contract rights and liabilities of the *Leeds and Selby Railway Company* to the *York and North Midland Railway Company*, and a clause (sect. 9) enacting that all the powers, clauses, matters, and things in the *York and North Midland Company's* Act should—so far as as they were not repealed, altered, varied, or otherwise provided for by this Act—extend to the *Leeds and Selby Railway* and the lands thereof by this Act agreed to be purchased, to all intents and purposes as if the said railway and lands had been by the *York and North Midland* Act made part of the *York and North Midland* undertaking, or as if the said powers, clauses, matters, and things had been expressly enacted in reference to the *Leeds and Selby Railway* and the lands thereof.

Held—That the original conveyance of the land incorporated the provisions as to minerals of the *Leeds and Selby* Act; that the 4th section of the Purchase Act transferred the land to the *York and North Midland Railway*, with the same mutual rights as to the minerals which had existed between the owners and the *Leeds and Selby Railway Company*, either

by force of the provisions of the Act so incorporated or by the operation of the general rules of law; and that the 9th section of the Purchase Act did not bring the minerals under or near the land conveyed within the operation of the clauses of the *York and North Midland* Act, the exception in that section being satisfied by the effect of the 4th section.

The Defendant was the owner of minerals under and near to the lands and tunnel comprised in the conveyance to the *Leeds and Selby Railway Company*, his title being derived under the grantor to the company subsequently to the conveyance to the company. He gave notice of his intention to work pursuant to the provisions of the *York and North Midland* Act, and the company not having elected to purchase, he claimed to be entitled to work—doing no wilful damage and not working improperly.

On a bill by a company now representing the *York and North Midland Railway Company*, a perpetual injunction was granted, restraining the Defendant from working such minerals, or any minerals to the support of which the company was entitled, in such manner as to occasion damage to the railway. *North-Eastern Railway Company v. Crossland*, 565

3. Before the formation of a Company, the Defendant and other landowners, being desirous of obtaining certain railway communication, signed an agreement with a person acting for the promoters, but described as the agent of the Company, that, if an Act were obtained in either of the two next sessions, they would sell such land as might be required for the railway at thirty years purchase.

The bill was lost in the first session, and after an alteration in the course of the line was passed in the second

REAL ESTATE, ADMINISTRATION.

session:—*Held*, that the agreement was binding on the landowners, and that it might be specifically performed at the suit of the Company, notwithstanding objections for want of privity, want of consideration, want of mutuality, and vagueness.

After the passing of the Act, the Company—before claiming the benefit of the agreement—served the Defendant with a common notice to treat, and did not formally insist on the agreement until the Defendant had appointed an arbitrator.

The Company subsequently entered under the 85th clause of the Lands Clauses Act: *Held*, that this clause applied exclusively to compulsory purchases: that the proceedings of the Company assumed the non-existence of any agreement: and on these grounds a bill by the Company and two promoters for specific performance of the agreement was dismissed. *Bedford and Cambridge Railway Company v. Stanley*, 746

See COPYHOLDS.

LANDS CLAUSES CONSOLIDATION ACT.

REAL ESTATE—ADMINISTRATION.

See PLEADING, 7.

RECITAL,

See MARRIAGE SETTLEMENT, 2.

RECITAL—ERRONEOUS.

See WILLS, 15.

RELEASE.

See LEASE.

RE-MARRIAGE.

See DIVORCE, 1.

RENT—COVENANT TO REMIT.

See LEASE.

SECURITY FOR COSTS. 797

RESIDUARY BEQUEST.

See WILLS, 12, 14, 16, 17.

RESIDUARY DEVISE.

See WILLS, 4, 10.

RESIDUE—COSTS.

See WILLS, 18.

RESTRAINT ON MARRIAGE.

See WILLS, 5.

REVERSION—PURCHASE OF.

See LEASE OF CHAPTER LANDS.

REVERSIONER.

See EASEMENTS.

REVIVOR.

See PRACTICE, 6.

RIGHT TO SUPPORT.

See RAILWAY COMPANY, 2.

SALE.

See ANNUITY.

SALE, POWER OF.

See MORTGAGE.

SECURITY.

See WILLS, 18.

SECURITY FOR COSTS.

A decree was made in several mortgagees' and annuitants' suits directing accounts and enquiries, and appointing a receiver, and authorising him, as the judge should direct, to keep down the interest on the incumbrances and pay the annuities; the costs of the several Plaintiffs to be added to their securities.

The Defendant, the mortgagor,

filed a bill to impeach the annuity-deed on which one of these suits was founded, or in the alternative to avoid certain clauses as to interest on arrears:—*Held*, that, the relief prayed being inconsistent with the decree already made, and the suit not being a proceeding by way of defence, the Plaintiff (who was out of the jurisdiction) was bound to give security for costs.

Applications as to security for costs may properly be made in chambers.
Tynte v. Hodge, 692

SEPARATE ESTATE.

See MARRIAGE SETTLEMENT, 2.
MARRIED WOMAN.

SEPARATE USE—DETERMINATION OF

See HUSBAND AND WIFE.

SEPARATED TRUST FUND—COSTS.

See WILLS, 13.

SERVICE.

See PRACTICE, 1.

SETTLEMENT.

Under a limitation of real estate in a marriage settlement, after the decease and failure of issue of husband and wife, "in trust for nephews and nieces then living, and the several and respective heirs of nephews and nieces then dead, having left lawful issue, living at the time of the failure of issue of the marriage, as tenants in common:—*Held*, that nephews and nieces took life estates, and that the eldest son of a nephew deceased at the time of such failure of issue took in fee. *Marshall v. Peascod*, 73

See DIVORCE.

SETTLING DAY.

See FRAUD.

SHARES—UNDERTAKING TO ACCEPT.

See JOINT STOCK COMPANY, 6.

SHIP.

The master of a ship, who, having authority to employ the vessel on freight to the best advantage, but not to purchase a cargo on the owners' account, and, being unable to procure remunerative freight, loads the ship with a cargo of his own:—*Held*, liable to account to the owners for all profits made by the sale of the cargo, and not merely for a proper freight.

The general principle, that a trustee cannot make a profit for himself by the use of the trust property, applies to an agent intrusted with a ship or other chattel for the purpose of using it for the owners' benefit. *Shallcross v. Oldham*, 609

SHIPPING.

A contract for the sale of a specific cargo afloat, "including freight and insurance," stipulating for "payment in exchange for bills of lading and policies of insurance, effected with approved underwriters, but for whose solvency sellers are not to be responsible," (no specific reference being made to any existing policy), does not operate as an assignment of, or necessarily entitle the purchaser to, the specific policies effected on the cargo at the port of shipment. Therefore, where, under such a contract, the cargo having fallen in value since the shipment, the vendor short indorsed such a policy for an amount sufficient, in the events which happened, to indemnify the purchaser against the loss of the ship, reserving to himself the balance, which the underwriters paid into court:—*Held*, that the vendor was entitled to such balance [*Reversed on appeal by the Lords Justices, see p. 176.*]

Tanvaco v. Lucas (30 Law J., N. S., Q. B., 234) explained.

Whether, the vendor having parted with all interest in the cargo, the underwriters might not have resisted a claim on his part to any portion of the amount insured, upon the ground that the policy was, to the extent of the amount so claimed, "a wager policy," and illegal under 19 Geo. 2, c. 37, s. 1—*Quære*.

But the underwriters having paid the balance into Court, the Court, as in *Sharp v. Taylor* (2 Phill. 801), must determine which of the parties is entitled to receive it. *Ralli v. The Universal Marine Insurance Company*, 159

ascertained on inquiry; and it further appeared that the Plaintiff had no knowledge of the quality of the limestone. The Defendant afterwards, and before signing the agreement, made a cursory inspection of the old quarry, and satisfied himself that the stone was limestone, but ascertained nothing as to its quality:—*Held*, that the misrepresentation was a bar to a decree for specific performance; and the bill dismissed without costs.

Whether the agreement was or was not void—*Quære*. *Higgins v. Samels*, 460

See JOINT STOCK COMPANY, 6.
RAILWAY COMPANY, 3.

SHORT INDORSEMENT.

See SHIPPING.

SOLICITOR APPROPRIATING DEPOSITS.

See MORTGAGE.

SPECIAL ACTS—INTERPRETATION OF.

See STATUTES.

SPECIAL EXAMINER.

See PRACTICE, 5.

SPECIFIC CHATTEL—DELIVERY OF.

See JURISDICTION, 2.

SPECIFIC PERFORMANCE.

Bill for specific performance of an agreement to take a lease of a limestone quarry. In the course of the treaty the Plaintiff had represented that the limestone was of a certain quality—the fact being that a quarry in the immediate neighbourhood had been worked, and the stone ascertained not to be of the specified quality. The result of this trial was not known to either party, but might have been

STALLAGE.

See MARKET.

STANNARIES.

See JOINT STOCK COMPANY, 3.
WINDING-UP, 2.

STATUTES.

29 CAR. 2, c. 3.

See STATUTE OF FRAUDS.

9 & 10 WILL. 3, c. 15.

See AWARD.

9 GEO. 2, c. 36.

See CHARITY.

58 GEO. 3, c. 45.

See STATUTES, INTERPRETATION OF.

59 GEO. 3, c. 134.

See STATUTES, INTERPRETATION OF.

11 GEO. 4 & 1 WILL. 4, c. 36, s. 15,
Rule 5.

See TIME, COMPUTATION OF.

2 & 3 WILL. 4, c. 71, s. 8.

See EASEMENTS.

3 & 4 WILL. 4, c. 105.

See DOWER ACT.

7 WILL. 4 & 1 VICT. c. 26, ss. 24, 34.

See WILLS, 3.

1 VICT. c. 26.

See WILLS, 10, 16.

2 & 3 VICT. c. 49.

See STATUTES, INTERPRETATION OF.

8 VICT. c. 18, s. 92.

See LANDS CLAUSES CONSOLIDATION ACT.

8 & 9 VICT. c. 109, s. 18.

See TIME BARGAINS.

12 & 13 VICT. c. 106.

See BANKRUPTCY CONSOLIDATION ACT.

12 & 13 VICT. c. 108.

See JOINT STOCK COMPANY, 3.

13 & 14 VICT. c. 35.

See PLEADING.

14 & 15 VICT. c. 97, s. 21.

See STATUTES, INTERPRETATION OF.

14 & 15 VICT. c. 104.

See LEASE OF CHAPTER LANDS.

15 & 16 VICT. c. 51.

See COPYHOLDS.

17 & 18 VICT. c. 113.

See WILLS, 2.

18 & 19 VICT. c. 32.

See JOINT STOCK COMPANY, 3.

19 & 20 VICT. c. 104.

See STATUTES, INTERPRETATION OF.

20 & 21 VICT. c. 78.

See JOINT STOCK COMPANY, 3.

20 & 21 VICT. c. 85.

See DIVORCE.

21 & 22 VICT. c. 94.

See COPYHOLDS.

21 & 22 VICT. c. 98.

See MARKET.

22 & 23 VICT. c. 35, s. 27.

See ADMINISTRATION.

22 & 23 VICT. c. 35, s. 32.

See INVESTMENT.

23 & 24 VICT. c. 34.

See JURISDICTION, 1.

23 & 24 VICT. c. 38, s. 12.

See INVESTMENT.

STATUTES—INTERPRETATION OF.

The rule of construction, that a general Act of Parliament does not repeal or affect a prior special Act of Parliament without express words of reference, applies to the Church Building Acts.

Therefore, the local Act, 56 Geo. 3, c. xxxix., for regulating the eccle-

siastical arrangements of the parish of *St. Pancras*, was held not to be affected by the 2 & 3 Vict. c. 49. And an order in council purporting, under the 3rd section of the latter, with the consent of the Bishop alone, upon the representation of the Ecclesiastical Commissioners, to order the assignment of a district to a parochial chapel built under the former Act—*Held*, ultra vires.

The insertion in a general Act of Parliament of a saving clause, providing, that the Act shall not apply to a special case which had previously been regulated by a special Act of Parliament not otherwise referred to, will not prevent the application of the rule of construction mentioned above.

The Church Building Act, 14 & 15 Vict. c. 97, s. 21, explained. *Fitzgerald v. Champneys*, 31

STATUTES OF DISTRIBUTION.

See MARRIAGE SETTLEMENT.

STATUTE OF FRAUDS.

See PLEADING, 5.

STOCK EXCHANGE.

See FRAUD.

TIME BARGAINS.

STRIKING OFF DEFENDANT.

See PRACTICE, 2.

SUBSTITUTED LEGACIES.

See WILLS, 15.

SUPPORT—RIGHT TO.

See RAILWAY COMPANY, 2.

TENANT FROM YEAR TO YEAR.

See EASEMENTS.

TENANT IN COMMON.

See ELECTION.

"THIRDS"—PROVISION IN LIEU OF.

See MARRIAGE SETTLEMENT, 1.

TIME BARGAINS.

Observations on the law as to time bargains. The question in such cases is, whether at the time of making the contract there was a bona fide intention to purchase or to deliver shares. If there was such an intention, the contract is good: if there was not such an intention, the contract is an "agreement by way of gaming or wagering" within the 18th section of the 8 & 9 Vict. c. 109, and by that section is null and void. *Barry v. Croakey*, 1

See FRAUD.

TIME, COMPUTATION OF.

When the time for doing an act or taking a proceeding is expressly fixed by Act of Parliament, the 12th Rule of Order xxxvii. of the Consolidated General Orders (providing for cases where the time for doing an act or taking a proceeding expires on a day on which the offices are closed) does not enable such act or proceeding to be done or taken after the expiration of the time so fixed.

Accordingly, where the thirty days limited by the Act 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, rule 5, as the period within which a Defendant in custody under process of contempt ought to have been brought by habeas corpus to the bar of the Court, expired on a day in term time, but on which the Courts were closed by special order of the Lord Chancellor:—*Held*, that the above-mentioned rule did not enable the Plaintiff to bring the Defendant to the

bar of the Court on the day on which the offices next opened.

And upon motion on such last-mentioned day that the Defendant might be turned over to the custody of the keeper of the Queen's Prison, the Court refused to make any order.
Flower v. Bright, 590

TITLE—AVERMENT OF.

See PLEADING, 5.

TRUST.

See DECLARATION OF TRUST.

TRUST—FAILURE OF.

See CHARITY.

TRUSTEE.

See INVESTMENT.
WINDING-UP.

TRUSTEE—REFUSAL TO SUE.

See PLEADING, 5.

TOTIES QUOTIES COVENANT.

See LEASE OF CHAPTER LANDS.

TRADE MARK.

See PLEADING, 2.

TRUSTEE.

See SHIP.

TRUSTEE ACT.

Upon a petition for appointment of new trustees of two trust funds, the costs ordered to be paid out of the two funds rateably. *Re Grant's Trusts*, 764

TRUSTEE & CESTUIQUE TRUST

The duties of trustees where their trust funds comprise stocks or securities which are payable to bearer and pass by delivery, and of which the

"WAGERING" CONTRACTS.

interest is payable upon coupons half-yearly.

Such securities may without breach of trust be deposited in a box at a banker's on account of all the trustees, one being allowed by the rest to keep the key of the box in order to obtain the coupons.

And if the bankers, without the privity or concurrence of the co-trustees, deliver the box to the trustee who has the key, the co-trustees remaining ignorant of the fact are not liable to make good securities which the latter subsequently withdraws from the fund.

Two of three trustees committing a box containing such securities to the third (a stockbroker) for the purpose of conversion, are bound to ascertain, when the box is returned to the bankers, that such conversion has been effected, and the new securities restored to the joint custody of all the trustees.

Two of three trustees, who, under such circumstances, rested satisfied with the assurance of the solicitor for the trust that he had seen the box returned to the bankers, without more—*Held* liable to make good such of the new securities as the third trustee had appropriated to his own use. *Mendez v. Guedalla*, 259

See PLEADING, 5.

ULTRA VIRES.

See JOINT STOCK COMPANY, 2, 4, 5.
RAILWAY COMPANY, 1.

UNDERTAKING TO ACCEPT SHARES.

See JOINT STOCK COMPANY, 6.

UN SOUND MIND.

See LUNATIC.

"WAGERING" CONTRACTS.

See TIME BARGAINS.

WAIVER.

See MORTGAGOR AND MORTGAGEE, 2.

WIDOW.

See WILLS, 5.

WIFE'S AFTER ACQUIRED PROPERTY.

See MARRIAGE SETTLEMENT, 2.

WILFUL DEFAULT.

See PRACTICE, 4.

WILLS.

1. Testatrix, having, by her will directed the trustees, who were also the executors of her will, to invest the residue of her property in the funds, left the interest to two nieces, to be paid to them half-yearly, and, at their decease, "the half-yearly dividends to be continued to their children till they came to the age of twenty-one years." She then "constituted and appointed" the said executors (nominatim) trustees for the said nieces and their children. All the children of a deceased niece had attained twenty-one: *Held*, that they were entitled absolutely to the moiety given to her for life. *Wilks v. Williams*, 125

2. A bequest of personalty, "subject to the payment thereof of all testator's just debts," following a devise of land in mortgage, which made no reference to the mortgage:—*Held* a sufficient indication of an intention on the part of the testator that the land should not, under the Act 17 & 18 Vict. c. 113, be primarily liable to the payment of the mortgage debt.

Therefore, under a will so worded, the mortgage debt and interest ought to be borne and paid out of the testator's personal estate.

Observations on a dictum of Lord Campbell, C., in *Woolstencroft v. Woolstencroft*, (6 Jur., N. S., 1171). *Mellish v. Vallins*, 194

3. A devise before 1838 of all my freehold hereditaments, and all my goods, chattels, "and generally all other my real and personal estates and effects whatsoever, whereof I, or any person or persons in trust for me, am, is, or are, or shall or may be seised or possessed:"—*Held*, to put the heir to his election as to after-acquired lands.

The authorities on election by the heir under such a devise reviewed. *Hance v. Truwhitt*, 216

4. On a bequest of all testator's personal estate, upon trust to lay out £2,000 in the purchase of an estate to be held on certain trusts, and upon trust to invest the residue of the personal estate and stand possessed of £1,500, part of testator's said estate, on certain trusts, and various other sums described as further parts of his said estate upon other trusts, followed by bequests of pecuniary legacies simpliciter, and a concluding gift of all the residue and remainder of testator's estate and effects, whatsoever and wheresoever, and whether in possession, reversion, remainder, or expectancy:—*Held* that the residuary clause passed the real estate charged with the pecuniary legacies, but not charged with the gifts directed out of the investment of the personal estate. *Greville v. Browne* distinguished.

Held, also, that the £2,000 was to be set apart in priority to the other gifts. *Gyett v. Williams*, 429

5. By a will, certain trusts were declared for the benefit of the widow of testator's nephew and her children, under which the widow was entitled to certain rents of real estate, and to annuities charged primarily on real

estate, and to be made up, if necessary, out of personal estate, with a condition subsequent that the trusts for the benefit of the widow should cease if she married:—*Held*, that the condition was valid. *Newton v. Marsden*, 356

6. Devise to *A.* of specific property "subject to a charge of £150," followed by a residuary bequest, without any disposition of the £150:—*Held*, that the devisee took free from the charge. *Heptinstall v. Gott*, 449

7. Devise of freehold and leasehold lands in *Kent*, in strict settlement, with an ultimate limitation to testator's own right heirs, the will also containing a similar disposition of other leaseholds in *Kent* not the subject of the suit:—*Held*, that the common law heir was entitled. *Sladen v. Sladen*, 369

8. Testator gave his real and personal estate to trustees, on trust out of the income of his residuary estate to pay an annuity of £200, and after the decease of the annuitant to permit the fund out of which the annuity might arise again to fall into and become part of his general residuary estate: and as to all his pure personalty, and so much of the annuity fund as should consist of pure personalty, subject and without prejudice to the annuity, to hold the same upon trusts for charity, and as to the rest of his estate for the *Queen*.

By a proviso the trustees were authorised to set apart a fund sufficient to produce the annuity, and when that should have been done were to be entitled to deal with the residue. The income of the estate was insufficient to produce the annuity:—*Held*, that the arrears were to be made good out of the corpus. *Perkins v. Cooke*, 393

9. Direction to executor to pur-

chase an annuity in Government securities, to the amount of £50 a-year, for *A.*—*Held*, that the annuity was perpetual. *Ross v. Borer*, 469

10. A general power given to the survivor of two persons may, under the Wills Act, be exercised by a general devise in a will executed by the ultimate survivor during the joint lives.

The 7th and 8th sections of the Wills Act preserve the previously existing incapacities arising from infancy and coverture respectively, but the 8th section does not preserve, in the case of married women, any incapacities not specially dependent on coverture, which are removed generally by other sections of the Act,—as, for example, those relating to after-acquired property or power. Therefore, where a general power was vested in the survivor of *A.*, *B.*, and *C.* (a married woman with testamentary capacity), and *C.* ultimately became the survivor:—*Held*, that the power was well exercised by a residuary devise in the will of *C.*, made while under coverture and during the life of *B.*

The circumstance that the devise contained limitations for the life of *B.*—*held* not to be a conclusive indication of an intention not to exercise a power which would only come into existence in the event of *B.* predeceasing the testatrix. *Thomas v. Jones*, 475

11. In construing a will of real estate the Court will look at the nature and circumstances of the property and at the value of the subjects of the various devises; and if the whole will, read by the light of such circumstances, discloses an intention inconsistent with restrictive words in the description of the subject of a devise, those restrictive words,

may, as a matter of construction, be rejected as *falsa demonstratio*.

Evidence of the intention of a testator or of mistake in the preparation of his will is not admissible, and an issue will not be directed on this ground to try whether particular restrictive words were or were not part of the will.

Where a will contained a devise of hereditaments "in the county of *Hants*," described as "my *Tedworth* estate," and it was proved that the testatrix had an estate at *Tedworth* extending into the two counties of *Hants* and *Wilts*, but which had been dealt with without regard to the county division, and the will contained various indications derived from the limitations of the estate and the value of the *Hants* and *Wilts* portions of it, tending to show that the testatrix must have intended to deal with the whole estate—*Held*, that although no one of these circumstances alone would have controlled the words of the devise, their cumulative force was sufficient to justify the rejection of the words "in the county of *Hants*" as *falsa demonstratio*.

Where a bill is not framed to establish a will and the heir does not dispute it—*Semble*, that the Court has no jurisdiction to declare against the heir as a Defendant the construction of a strictly legal devise as regards the quantum of the subject matter. But if the heir elects to be dismissed, the Court will make such a declaration for the guidance of the trustees. *Stanley v. Stanley*, 491

12. Testamentary power to appoint a trust fund among all or any of donee's children. Bequest by donee as follows: "all my personal estate upon trust to pay all just debts and funeral expenses; to pay to my daughter *E.* £19; and to my daughter *J.* the whole of my furniture and household effects; and as to my money

in the funds, and all my residue of my personal estate" upon further trusts for the benefit of *J.*

At the date of the will and of the death the testator had no money in the funds, and the trust fund consisted of a sum of Consols:—*Held*, that the will was not an appointment. *Mattingley's Trusts*, 426

13. Bequest as follows: "I give and bequeath to *E. R.* all my property, real and personal, except £500 a-year, which I give and bequeath unto *E. H.*: *Held*, following *Stokes v. Heron* (12 Cl. & F. 161, 192), that *R. H.* was entitled to so much of testator's residuary estate as would produce £500 a-year in perpetuity.

Held also, that *R. H.* was entitled to so much of a sum of New 3 per Cents. (part of the testator's estate remaining unapplied), as would produce the £500 a-year, since he had a right to the best security to be obtained.

Explanation of *Evans v. Jones* (2 Coll. C. C. 526); and observations on *Lett v. Randall* (2 D. G. F. & J. 392, 393).

Rule as to costs between parties claiming a trust fund which has been separated from the general residue. *Hill v. Rattey* (alias *Potts*), 634

14. Testator by his will bequeathed several sums of money to several pecuniary legatees by name, including one of £500 to his sister, and bequeathed the residue of his personal estate "unto all the before-mentioned pecuniary legatees" (with certain exceptions) "to be divided among them in proportion to their respective pecuniary legacies:—*Held*, that the residue was not given to the pecuniary legatees as a class; and that, the testator's sister having died in his lifetime, the surviving pecuniary legatees were not entitled to her share.

By a codicil the testator, after

reciting his sister's death, bequeathed the sum of £500 to a trustee for her children, but was silent as to the residue:—*Held*, that neither *Lord Carrington v. Payne* (5 Ves. 404), nor *Johnstone v. The Earl of Harrowby* (1 D. G. F. & J. 183), entitled the children to their mother's share of the residue, and that there was an intestacy as to that share. *In re Gibson's Trusts*, 656

15. A testator gave by will £3,000 upon trust for *A.* and her children, and after the decease of *A.* without issue, for the children of *B.* By a codicil of later date the testator recited that he had by his will given the £3,000 to *A.* for life, with remainder to her children, and afterwards to *B.* for life, with remainder to his children, and revoked the will as to £2,000, part of the £3,000, from and after the devise to *A.* and her children, and, instead of giving the said sum of £2,000 to *B.* and his children, bequeathed the same to *C.*:—*Held*, that the erroneous recital in the codicil, that the £3,000 was given to *B.* for life, did not amount to a gift of a life estate in the £1,000 which remained unrevoked.

By the will the testator had also given £2,000 to *B.* for life, with a gift over on insolvency:—*Held*, that, if the codicil had been read as an implied gift of £1,000 to *B.* for life, the gift over on insolvency would have attached to the £1,000 as well as to the £2,000. *Re Smith*, 594

16. A testator was under covenant to pay £2,000 to the trustees of his settlement, upon trust for his wife for life, with remainder to his general appointees by deed or will.

By his will, he directed the executors to pay the £2,000 to the trustees, in order that they might invest it, and pay the income to the wife for life and then bequeathed his

residuary estate, subject to certain legacies, to the wife absolutely:—*Held*, that the residuary bequest was a good execution of the power.

Semble, nothing short of inconsistency can amount to the contrary intent required by the statute. *Scriven v. Sandom*, 743

17. By her will, a testatrix, after directing certain legacies in certain events to fall into the residue, bequeathed specified articles "and other personal effects" to *A.* and *B.*, in confidence that they would distribute and dispose of them as she by memorandum or otherwise might direct; and appointed *A.* and *B.* her executors.

By a codicil the testatrix directed her "executors and residuary legatees" to vary certain bequests, and empowered them to postpone legacies, the interest in the meantime "to form part of my residuary estate," and gave a legacy to "*A.*, one of my executors and residuary legatees."

By a second codicil, the testatrix gave a life interest to a legatee in a sum which under the former dispositions would have fallen into the residue, and stated that the alteration would make but little difference, as the sum would ultimately fall into the residue. After authorising the executors to postpone the payment of legacies, and giving other directions, the codicil concluded thus: "These wishes written by myself and only concern the interest of my executors will, I feel sure, be quite sufficient for them to fulfil all herein mentioned, but will perhaps be more correct if I sign my name in the presence of two witnesses who are also in the presence of each other."

Held, that on the will alone the executors would have taken the residue, subject to a trust for the next of kin; but that the word "confidence" in the will admitted of explanation,

and was explained by the codicils not to amount to a binding trust.

Held also, that on the will as explained by the codicils, the bequest to the executors was not limited to things ejusdem generis with those described, but included the whole residue.

Held, consequently, that the executors took the whole residue beneficially. *Shepherd v. Nottidge*, 766

See ELECTION.
LEASE.

WINDING-UP.

1. The deed of settlement of a company provided, that no deed of transfer should be deemed complete, and no person should be registered as a shareholder until he had executed the deed of settlement; and that the company should not be bound to recognise equitable title, but that the persons to whom shares should be legally assigned should be considered the absolute assignees.

Certain shares were settled, and a notice of transfer to the trustees

was duly given to the company by the settlor. The trustees never executed the deed of settlement of the company, and no transfer deed was ever executed; but the names of the trustees were registered and retained as shareholders, with the word "trustees" added in the margin. They also gave receipts for dividends as trustees:—*Held*, that they were liable as contributories to the full extent, and that they could not be put on the list as trustees liable only to the extent of the trust estate. *Re Phoenix Life Assurance Company, Hoare's Case*, 229

2. On a petition to wind-up a company within the Statutes a creditor is not entitled to appear and oppose. *Re Tretoil and Messer Mining Company*, 421

See JOINT STOCK COMPANY, 1, 2, 3
4, 5.

YEARLY TENANT.

See EASEMENTS.







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